Supreme Court, U.S.
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No. 98 722

In the

Supreme Court of the United States

October Term, 1998

MICHAEL L. DAVIS,

Petitioner,

-v-

JOHN ZIRKELBACH; RICHARD WHITLOW; MARVIN GUEST, SR., as Chief of Police for the City of Evansville, Indiana; THE CITY OF EVANSVILLE, INDIANA, CHRISTIAN M. LENN; JONATHAN J. PARKHURST; and STANLEY M. LEVCO, as Prosecuting Attorney for Vanderburgh County, Indiana,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

I. ARE PROSECUTORS ENTITLED TO ABSOLUTE IMMUNITY FOR THEIR ACTIONS IN INITIATING AND MAINTAINING A CRIMINAL PROSECUTION EVEN IN A CASE WHERE (1) THE INITIATION AND MAINTENANCE OF THE PROSECUTION WAS ITSELF IN VIOLATION OF CRIMINAL LAW, AND (2) THE PROSECUTORS HAVE NO DISCRETIONARY POWER OR AUTHORITY TO EXERCISE IN INITIATING OR MAINTAINING THE PROSECUTION?

II. ARE LAW ENFORCEMENT OFFICIALS ENTITLED TO QUALIFIED IMMUNITY IN A CASE WHERE (1) THE ACTION AGAINST THEM IS BASED UPON AN ACT OF CONGRESS THAT CONTAINS SPECIFIC DEFENSES TO CIVIL ACTIONS BROUGHT UNDER THE ACT, AND (2) WHERE THE OFFICIALS RELY UPON FALSE LEGAL ADVICE WHEN THE LAW APPLICABLE TO THEIR ACTIONS IS WELL ESTABLISHED?

III. IS KNOWLEDGE OF A HEARSAY ALLEGATION THAT A PARTY HAS POSSESSION OF AN AUDIOTAPE CONTAINING A CONVERSATION BETWEEN THE PLAINTIFF AND ANOTHER PERSON, STANDING ALONE, SUFFICIENT "INQUIRY NOTICE" TO TRIGGER ACCRUAL OF THE TWO YEAR STATUTE OF LIMITATION UNDER THE FEDERAL WIRETAP ACT (18 U.S.C. § 2520(e))?

IV. DOES RESPONDEAT SUPERIOR LIABILITY UNDER SECTION 1983 ATTACH WHERE A SENIOR POLICE OFFICIAL OF A MUNICIPALITY HAS KNOWLEDGE OF A PLAN BY SUBORDINATES TO DEPRIVE A CITIZEN OF CIVIL RIGHTS IN VIOLATION OF FEDERAL LAW AND DOES NOT TAKE ACTION TO STOP THE DEPRIVATION?

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Opinions Below

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in *Davis v. Zirkelbach*, 149 F.3d 614 (7th Cir. 1998), (App. 1a). The relevant interlocutory orders with attached memoranda of the United States District Court for the Southern District of Indiana are those of February 18, 1993 (App. 15a), December 16, 1994 (App. 19a), and September 12, 1995 (App. 40a). The final judgment of the District Court was entered on December 24, 1996 (App. 69a).

Statement Of The Basis Of Jurisdiction Of The Supreme Court

The statutory provision for this Court's jurisdiction is found in 28 U.S.C. § 1254. The United States Court of Appeals for the Seventh Circuit issued its opinion in this case on July 9, 1998. This Petition was filed within 90 days of the opinion's issuance, and is timely.

Constitutional And Statutory Provisions Involved

Relevant portions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 [18 U.S.C. §§ 2510--2522] ("Federal Wiretap Act") appear in the Appendix hereto beginning a page 71a.

Statement Of The Case

In May, 1990, Respondents John Zirkelbach and Richard Whitlow were detectives in the narcotics division of the Evansville, Indiana Police Department ("EPD"). Early that month, Michael D. May, an automobile dealer, had contacted Whitlow concerning suspicions that May alleged that

he had about Petitioner Michael L. Davis, his business associate.

May provided Whitlow with a copy of an audiotape recording of a conversation between Davis and a Jeannette Duncan. Duncan was an employee of a local publication with which Davis had a long-standing business relationship. The recording was derived from a wiretap placed on a telephone in Davis' office at May and Davis' car lot. The recording apparently contained some conversation about a possible drug purchase, and was made without the knowledge or consent of either Davis or Duncan.

Zirkelbach and Whitlow claimed to have no prior acquaintance with May, who was not known to them to have been a police informant before, nor any prior knowledge of either Davis or Duncan. Both also claimed that they had nothing to do with setting up the wiretap, which May did himself as far as they knew.

Immediately after the audiotape was received by the EPD, Whitlow listened to the tape and reviewed the matter with the then-head of the narcotics division, Lt. Patti Dee Wazny. Whitlow and Wazny correctly assumed that neither Duncan nor Davis knew they were being taped, and because of this believed they needed legal advice before proceeding further with any criminal investigation. Whitlow and Wazny then contacted Respondent Christian M. Lenn, a deputy prosecutor of the Vanderburgh County Prosecutor's Office, to inquire if the tape and its contents could be used to secure the cooperation of Duncan as a "confidential informant" ("CI") against Davis, that is, to "flip" her. After about a half hour of research, Lenn advised Whitlow and Wazny that the tape could not be used as evidence in a drug prosecution against Davis or Duncan, but that it could be used to flip Duncan. Without this "go ahead" from Lenn, Zirkelbach and Whitlow would not have proceeded with the scheme to flip Duncan.

Duncan was subsequently contacted and confronted regarding the tape recording of her conversation with Davis by Zirkelbach. She thereafter reluctantly participated in the EPD's investigation of Davis in order to conceal from her husband and family her participation in these matters. Duncan became a CI and purchased drugs from Davis in connection with the investigation. On the basis of this purchase of drugs, Zirkelbach and Whitlow obtained a search warrant for Davis' residence. After a search pursuant to the warrant, Davis was arrested by the EPD on May 11, 1990, for alleged violations of controlled substance statutes.

Davis was formally charged in state court with controlled substance law violations on May 17, 1990. Another arrest of Davis on September 11, 1990, resulted in an additional criminal prosecution in the same court for allegedly intimidating May after the first arrest. The drug prosecution and the intimidation prosecution continued until each was dismissed on the State of Indiana's motion on July 30, 1991, and on December 10, 1991, respectively.

In July of 1990, Davis came to the EPD internal affairs division to make a complaint regarding the conduct of Zirkelbach and Whitlow in dealing with Duncan and using her as a CI against him in the narcotics investigation. No action whatever was taken against any officer as a result of Davis' complaint.

On September 9, 1992, Davis filed his complaint in the District Court against the Respondents and others seeking relief under the Federal Wiretap Act, and under 42 U.S.C. § 1983. The complaint also had pendent state claims brought under the Indiana Wiretap Law, and for certain common law torts. On November 4, 1992, Respondents Lenn, Jonathan J. Parkhurst, and Stanley M. Levco (in his official capacity) (collectively, "respondent prosecutors") filed their motion to dismiss the action as to them on the ground of absolute immunity. After reviewing the matter, the District Court dismissed the appellee prosecutors from the case in an order of February 18, 1993. (App. 15a-18a).

On June 14, 1993, Respondents John Zirkelbach, Richard Whitlow, Art Gann (in his official capacity)[1] and the City of Evansville, Indiana (collectively "respondent police") filed their motion for partial summary judgment on the federal claims on the grounds of qualified immunity and lack of respondeat superior liability. The District Court granted the motion in part on December 16, 1994, by dismissing the federal claims against Zirkelbach and Whitlow as to installation of the wiretap, and all of the federal claims against Gann and the City. The motion was denied as to all remaining claims against Zirkelbach and Whitlow under the Federal Wiretap Act. (App. 19a-39a).

On July 8, 1993, Davis filed his motion to amend the complaint, seeking to add certain facts to the complaint and to serve the amended complaint upon Lenn on the ground of newly discovered evidence indicating involvement by Lenn in the investigatory phase of the criminal case. The District Court granted the motion by order of June 29, 1994.

On January 13, 1995, Lenn filed a motion to dismiss the action against him on the grounds of res judicata and failure to state a claim. Davis filed a motion for partial summary judgment on March 1, 1995, seeking damages and other relief under the Federal Wiretap Act from Zirkelbach, Whitlow and Lenn; and similar relief under the Indiana Wiretap Law from Zirkelbach, Whitlow, Lenn and the City. On May 1, 1995, the respondent police and Lenn both filed cross motions for summary judgment. The respondent police sought summary judgment on all remaining claims on the grounds of qualified immunity, statute of limitations, and untimely state tort claims notice. Lenn sought summary judgment on all claims on the grounds of res judicata, statute of limitations, failure to state a claim, state law absolute immunity, and Indiana Tort Claims Act immunity. The District Court ruled upon all these motions in its partial summary judgment of

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[1] In August, 1998, Art Gann was succeeded by Marvin Guest, Sr. as Chief of Police for the City of Evansville, and thus has been replaced in the caption by Guest.

September 12, 1995. (App. 40a-68a). The court denied Davis' motion for partial summary judgment, and denied Lenn's motion to dismiss as moot. The cross motion of the respondent police was granted as to the federal claims, the Indiana wiretap claim, and part of the malicious prosecution claim; but was denied as to the remainder of the state law claims. Lenn's cross motion was granted. After an October 10, 1995 hearing on remaining matters, the District Court entered its Final Judgment on December 24, 1996, in favor of all respondents as to all claims and dismissing the action. (App. 69a-70a).

Davis filed a timely appeal from the final judgment to the Seventh Circuit Court of Appeals, which affirmed the judgment of the District Court. In particular, the Seventh Circuit held that (1) the respondent prosecutors were absolutely immune from liability for their actions in commencing and continuing the criminal prosecutions against Davis under federal and state law, (2) the action under the Federal Wiretap Act was filed after the two-year bar of 18 U.S.C. § 2520(e), (3) the action under the Indiana Wiretap Law was filed after the two-year bar of Ind. Code § 35-33.5-5-4(d), and (4) the respondent police were entitled to qualified immunity under the "extraordinary circumstances" exception first identified in *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). (App. 1a-14a).

Argument

I. THE OPINION OF THE COURT OF APPEALS GIVES NO CONSIDERATION TO THE CRIMINAL ILLEGALITY OF THE PROSECUTIONS AGAINST DAVIS AND THE EFFECT OF THE SAME UPON THE AVAILABILITY OF ABSOLUTE IMMUNITY.

Like the District Court before it, the opinion of the Seventh Circuit gives no consideration to the question of what effect the criminal illegality of the prosecutions against

Davis has upon the availability of absolute immunity to the respondent prosecutors. (See, App. 4a-6a, 17a-18a, 63a-65a). This Court has stated that, "Absolute immunity . . . is 'strong medicine, justified only when the danger of [officials' being] deflect[ed from the effective performance of their duties] is very great.'" *Forrester v. White*, 484 U.S. 219, 230 (1988) (quoting dissenting opinion of Posner, C.J., below at 792 F.2d 647, 660 (7th Cir. 1986)). It is not the rank of the official but rather the matters that are committed by law to the official's control or supervision which must guide the court in determining the scope of immunity. *Barr v. Matteo*, 360 U.S. 564, 573-74 (1959).

Absolute immunity only attaches to certain functions of the prosecutor's office. This is because the purpose of absolute immunity is to protect the functioning of the office, not the officeholder. *Forrester*, 484 U.S. at 226; *Burns v. Reed*, 500 U.S. 478, 494 (1991); *Kalina v. Fletcher*, 522 U.S. ____, 118 S.Ct. 502, 139 L.Ed.2d 471, 478 (1997). A distinction has been drawn between the adjudicative functions and the administrative or investigatory functions of the office of prosecutor. The former are generally entitled to absolute immunity, while the later receive only qualified, or "good faith," immunity. *Forrester*, 484 U.S. at 226-30; *Burns*, 500 U.S. at 494-95; *Kalina*, 139 L.Ed.2d at 479-80.

However, there is a question here more basic than whether the respondent prosecutors were engaging in adjudicative or investigatory functions: did they ever have any discretionary authority to exercise to begin with in initiating and maintaining the prosecutions against Davis? If not, there is no good cause to allow absolute immunity to attach here. The purpose of extending absolute immunity is the protection of the decision-making authority and discretion of the office. *Imbler v. Pachtman*, 424 U.S. 409, 424-28 (1976). As this Court has noted:

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public

> trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. [Citations omitted].

Id. at 424-25. Granting immunity to the individual officeholder is incidental to achieving this goal, not the intended ultimate aim. *See, id., and Houston v. Partee*, 978 F.2d 362, 366 (7th Cir. 1992), *cert. denied*, 507 U.S. 1005 (1993).

The complaint states that Lenn and Parkhurst acted with knowledge of how the audiotape had been obtained at the time they commenced the drug prosecution against Davis. Due to this prior knowledge, and because the evidence serving as probable cause came into being as a result of the use of the illegally intercepted conversation against Duncan, the drug prosecution was thoroughly tainted with criminal illegality at its very inception. *See*, 18 U.S.C. § 2511(1)(d) (1994). The actions of the prosecutors in question here are not ones that they had the general power or discretion to perform, but that were performed wrongly given the particular circumstances. Rather, these actions are positively *prohibited* by criminal statutes, which statutes also specifically provide for civil remedies for violations. *See*, 18 U.S.C. § 2520 (1994); Ind. Code § 35-33.5-5-4 (1994). Such actions, given their criminal nature, cannot be considered "authorized" or "within the scope of discretion" as those terms are understood in law. Accordingly, there was also no decision-making discretion or authority to be protected by absolute immunity here.

However, the Seventh Circuit felt that the criminal illegality of the prosecutions themselves was of no importance here: "[t]he fact that the prosecutions in some sense may have rested on violations of the Federal Wiretap Act and its Indiana counterpart makes no difference." (App. 5a). The

opinion makes no distinction between the not uncommon case of wrongly exercised authority or discretion and the rather unusual case presented here, that is, a case of there being *no* authority or discretion to exercise from the very outset.

A recently decided case of the District of Columbia Circuit also raises grave doubts concerning the applicability of absolute immunity here. In *Berry v. Funk*, 146 F.3d 1003 (D.C. Cir. 1998), the court held that law enforcement officials[2] could not maintain a claim of qualified immunity as a defense against a Federal Wiretap Act claim. *Id.* at 1013-14. The court held that by enacting the Federal Wiretap Act, Congress 'occupied the field,' replacing the common law defense of qualified immunity with the specific defenses set forth in the Act:

> When Congress itself provides for a defense to its own cause of action, it is hardly open to the federal court to graft common law defenses on top of those Congress creates. *See, City of Milwaukee v. Illinois*, 451 U.S. 304, 314, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) ("[W]hen Congress itself addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.")

Id. at 1013. As with qualified immunity, absolute immunity is firmly grounded in common law. *See, Imbler*, 424 U.S. at 421-24; *Kalina*, 139 L.Ed.2d at 477-78. It would appear that the rationale of the District of Columbia Circuit in *Berry* applies with equal force here.

Indiana law also extends absolute immunity to the functions of the office of prosecutor. *Foster v. Pearcy*, 270 Ind. 533, 535-38, 387 N.E.2d 446, 448-50 (1979), *cert.*

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[2] State prosecutors are included in the definition of "law enforcement officer" under the Federal Wiretap Act. 18 U.S.C. § 2510(7) (1994).

denied, 445 U.S. 960 (1980). As under federal law, the purpose of absolute immunity is to protect the functioning of the office, not the officeholder. *Foster v. New*, 407 N.E.2d 271, 274 (Ind. App. 1980). The goal in extending this immunity is the protection of the decision-making authority and discretion of the office. *See, id.* at 273-74. In order for a particular act or course of action to qualify for absolute immunity, it must come within the general scope of the prosecutor's authority. *Foster*, 270 Ind. at 537-38, 387 N.E.2d at 449. Indiana does not apply the investigatory-adjudicative function test that is applied to federal law claims. *Id.*, at 536-37, 387 N.E.2d at 448-49. Under common law and under the Indiana Tort Claims Act [Ind. Code 34-4-16.5], immunity will attach to those acts reasonably within the scope of the prosecutor's authority or discretion which involve errors, mistakes in judgment or unwise decisions made in the exercise of that authority or discretion. *Id.* at 538, 387 N.E.2d at 449-50.

As goal of extending absolute immunity is the same in Indiana as it is in the federal system, the same basic legal analysis is also applicable here. The actions set forth in the record, due to their criminal nature, cannot be considered "authorized" or within the scope of "discretion" as those terms are understood in Indiana law. There was absolutely no legal discretion or authority for the prosecutors to have exercised in pursuing the prosecutions against Davis, as they were both thoroughly tainted with criminal illegality at their very inception. *See, id. and* 18 U.S.C. § 2511(1)(d) (1994). Accordingly, there was also no decision-making authority or discretion to be protected by absolute immunity as a matter of Indiana law.

The opinion of the Seventh Circuit mechanistically applies the rules of absolute immunity here without any particular regard to the peculiar facts of this case or the particular statutes that are involved. The extension of absolute immunity to the respondent prosecutors here cannot serve the purposes for which the immunity was intended.

II. THE OPINION OF THE COURT OF APPEALS EXTENDS QUALIFIED IMMUNITY AS DEFENSE AGAINST A STATUTORY CLAIM ALREADY HAVING SPECIFIC STATUTORY DEFENSES, AND MISCONSTRUES THE "EXTRAORDINARY CIRCUMSTANCES" EXCEPTION

As noted in the preceding section of this Argument, the District of Columbia Circuit in *Berry v. Funk* held that the common law defense of qualified immunity has no application to a Federal Wiretap Act claim. 146 F.3d at 1013-14. The opinion of the Seventh Circuit, however, proceeds from the conflicting point of view that the rules of qualified immunity do have general application to the Federal Wiretap Act claim here. (See, App. 10a-13a). Agreeing with the judgment of the District Court that Respondents Zirkelbach and Whitlow acted in clear violation of a well- established law (the Federal Wiretap Act), the Seventh Circuit opinion then turns to the issue of whether the District Court properly applied the "extraordinary circumstances" exception, extending qualified immunity to the respondent police nonetheless. (App. 10a).

The basic test for extending qualified immunity is found in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, this Court held that "governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*, 457 U.S. at 818. This standard is an objective, not subjective, one. *Malley v. Briggs*, 475 U.S. 335, 343-45 (1986). It is also briefly recognized in *Harlow* that extraordinary circumstances might occasionally justify an extension of immunity, but that even then such a determination "would turn primarily on objective factors." 457 U.S. at 819.

Both courts below relied primarily upon the case of *V-1 Oil Co. v. Wyoming*, 902 F.2d 1482 (10th Cir. 1990),

cert. denied, 498 U.S. 920 (1990), in applying the extraordinary circumstances exception. (App. 11a-13a, 53a-57a). The *V-1 Oil* case involved a state environmental protection agency acting under a state statute that on its face authorized warrantless searches for violations of the state's environmental code. *Id.*, 902 F.2d at 1485-86. The issue of the statute's constitutionality had not been previously considered. *Id.* at 1489. Under these circumstances, and because the defendant sought legal advice before acting under the statute's authority, the court held that qualified immunity still applied. *Id.* However, the court also noted that the act of seeking legal advice alone was certainly not an "extraordinary circumstance" justifying an exception to the normal rules of qualified immunity. *Id.* at 1488. The court felt that such an exception should only be found "rarely." *Id. See also, Tubbesing v. Arnold*, 742 F.2d 401, 407 (8th Cir. 1984).

The Seventh Circuit affirmed the District Court, concluding that all of the "four factors" mentioned in *V-1 Oil* are present in this case, and therefore the exception and qualified immunity applies. The four factors are as follows: (1) how unequivocal and specifically tailored the advice was to the facts giving rise to the controversy, (2) whether complete information was provided to the advising attorney, (3) the prominence and competence of the attorney, and (4) how soon after the advice was received that the disputed action was taken. *V-1 Oil*, 902 F.2d at 1489. Reading the *V-1 Oil* opinion as a whole, it is apparent that the purpose of the four factors is to see if a strong causal link exists between the advice and the disputed action; ruling out any superior intervening cause for the action taken.

The opinion treats these four factors as the *exclusive* factors for consideration in applying the exception in cases involving reliance on legal advice. (App. 11a-13a). However, the Tenth Circuit in *V-1 Oil* did not so hold, nor does a reasonable reading of that case necessarily lead to such a conclusion. In addition to discussing facts relevant to the four factors, the Tenth Circuit gave a rather detailed discussion of the circumstances surrounding the advice that it felt

indicated that the advice was or was not given in an "extraordinary circumstance." *Id.* at 1486-89. The same can be said for the other Tenth Circuit case and the Fourth Circuit case cited in the opinion (App. 11a). *See, Hollingsworth v. Hill*, 110 F.3d 733, 738-42 (10th Cir. 1997); *Buonocore v. Harris*, 134 F.3d 245, 247, 251-53 (4th Cir. 1998). On their face, the four factors can be just as easily applied to ordinary circumstances in which attorneys give advice as they can be to "extraordinary" circumstances. The opinion simply does not cite any particular facts or legal problems to explain how Lenn's advice took place in "extraordinary" circumstances. While the opinion does mention the use of improperly gathered evidence for indirect purposes, such as impeachment (App. 12a), this is hardly an extraordinary circumstance, nor does the Seventh Circuit actually suggest that it is "extraordinary."

The approach taken by the District of Columbia Circuit in its well-reasoned *Berry* opinion is preferable to the far more problematic approach taken by the Seventh Circuit in its opinion. The Seventh Circuit's partial application of the Tenth Circuit's opinion in *V-1 Oil* is at odds with the approach actually taken in the Fourth and Tenth Circuits for the reasons noted above, and further creates an exception that can readily and completely swallow the rule.

III. THE OPINION OF THE COURT OF APPEALS HOLDS THAT KNOWLEDGE OF HEARSAY ALLEGATIONS OF FACTS THAT ARE NOT A PART OF A VIOLATION UNDER THE FEDERAL WIRETAP ACT CAN NONETHELESS BE SUFFICIENT "INQUIRY NOTICE" TO TRIGGER ACCRUAL OF THE STATUTE OF LIMITATIONS UNDER THE ACT.

The Seventh Circuit's opinion holds that Davis filed his federal wiretap action beyond the two-year bar of 18 U.S.C. § 2520(e). (App. 7a-8a). Specifically, that the

hearsay allegations related to Davis in May, 1990 by Duncan that Zirkelbach was in possession of an audiotape of a conversation between Davis and Duncan, which tape was never played before either of them, provided a "reasonable opportunity to discover the violation" within the meaning of the statute.

Davis often had business dealings with Duncan over the telephone, in person at the car lot, and in person at the offices of Duncan's employer. In late May, 1990, Davis was informed by Duncan that Zirkelbach told her that he had a tape recording of a conversation between her and Davis, and that it had contents damaging to her, but that Zirkelbach did not play this tape for her. Prior to September 12, 1990, Davis had no idea whether the intercepted conversation was a face-to- face, telephone, or other conversation; did not know the specific contents of the conversation; and had no confirmation of Duncan's story on the tape. On September 12, 1990, Davis first discovered that the intercepted conversation Duncan referred to was in fact a telephone conversation. On that day, Davis was undergoing a probable cause hearing in state court on the charge of intimidating May. Zirkelbach testified under oath at that hearing. On direct examination by the State, Zirkelbach revealed that the tape did in fact exist and that it was of a telephone conversation between Davis and a "female subject."

From Zirkelbach's testimony, Davis concluded that it was likely that the tape was made from a wiretap placed on his business telephone. He promptly informed his then-counsel, Michael J. Danks, of Zirkelbach's revelations concerning the tape. On September 26, 1990, Danks filed a discovery motion upon the State in the drug prosecution. In response to that motion, the State presented Danks with a copy of the tape in January, 1991.

Surreptitious tape recording of other parties' conversations in itself is not a violation of the Federal Wiretap Act. *United States v. Taketa*, 923 F.2d 665, 675 (9th Cir. 1991); *Kemp v. Block*, 607 F.Supp. 1262, 1263-64 (D. Nev. 1985).

While such behavior may be reprehensible, it is not actually prohibited, except to the extent that it otherwise forms an integral part of a prohibited interception, disclosure or use as defined in the Act. *See*, 18 U.S.C. §§ 2510, 2511(1) (1994). In the present case, the interception was done through a wiretap. The tape recording did preserve the conversation, but it was not the means of interception. The tape recording itself here was not in violation of the Act.

A better reasoned approach to determining the accrual of the period was taken by the Eighth Circuit in *Andes v. Knox*, 905 F.2d 188 (1990), *cert. denied*, 498 U.S. 952 (1990). In that case, which also involved interception by telephone wiretap, the court held that the period under § 2520(e) ran two years from the time that the wiretapping was discovered by the plaintiff. *Id.*, 905 F.2d at 189. Considering both the inherently secretive nature of wiretapping and the discovery rule contained in § 2520(e), this would appear to be the most reasonable accrual rule to apply in cases involving interception by wiretap.[3] Therefore, under the *Andes*, Davis' third-hand knowledge of allegations in late May, 1990 that there was a tape of a conversation between himself and Duncan in the possession of the EPD is not by itself sufficient to indicate that a violation likely existed and to trigger the accrual of the limitation period. Although *Andes* is cited in the opinion (App. 8a), the Seventh Circuit's approach to the question of accrual is significantly different from that of the Eighth Circuit in that facts in question that the *Andes* plaintiff was aware of were facts that formed a part of the actual violation in question, unlike the case here.

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[3] However, it should be noted here that separate violations of the Federal Wiretap Act involving the same communication and occurring after the interception have been held to each have their own separate limitation accruals. *See, Fultz v. Gilliam*, 942 F.2d 396, 399-404 (6th Cir. 1991).

IV. THE OPINION OF THE COURT OF APPEALS FAILED TO CONSIDER THE "DELIBERATE INDIFFERENCE" EXCEPTION TO THE GENERAL RULE THAT THERE IS NO RESPONDEAT SUPERIOR LIABILITY FOR MUNICIPALITIES IN SECTION 1983 ACTIONS.

The opinion briefly concludes with no significant discussion that any claim for respondeat superior liability under § 1983 against Respondents Gann and the City of Evansville is barred by this Court's decisions in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) and *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997). (App. 9a-10a, 13a-14a). However, if officials of a municipality fail to address the tortious or criminal activity of their employees or subordinates, which failure causes damages to citizens under the jurisdiction of the municipality, that "deliberate indifference" can be used to show a "policy" or "custom" for purposes of § 1983 liability. *See, Canton v. Harris*, 489 U.S. 378, 388-90 (1989). A single act of a sufficiently high ranking officer can be enough to establish a "custom," when there is specific knowledge of an unlawful act by a subordinate and the officer fails to react to stop the act or future such acts. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986); *Bohen v. City of East Chicago, Indiana*, 799 F.2d 1180, 1189 (7th Cir. 1986).

In the present case, the then-ranking officer in the narcotics division, Lt. Patti Dee Wazny, by her own testimony, had prior knowledge of the use of the tape involved here, and the fact that it was made without the knowledge of either participant in the conversation. The prior knowledge of such a high-ranking officer within the department concerning the tape and its use would tend show deliberate indifference on the part of the City in dealing with the tape that fell into the hands of their police officers. The issue was squarely before the Seventh Circuit.

Conclusion

The Seventh Circuit has mechanically applied the rules of absolute immunity in this case in such a way that its opinion is in significant conflict with the well-reasoned *Berry* decision of the District of Columbia Circuit and with the basic purposes that the immunity was intended to serve. The Seventh Circuit opinion also conflicts with the *Berry* decision and with decisions of the Fourth and Tenth Circuits in its incomplete analysis of the availability of qualified immunity, and in particular in the all too ready availability of the "extraordinary circumstances" exception. The approach taken by the Seventh Circuit in establishing the accrual of the statute of limitations under the Federal Wiretap Act is at odds with the result in the *Andes* decision of the Eighth Circuit, and at odds with the secretive reality of wiretapping and other surveillance. Finally, the issue of respondeat superior liability under § 1983 is well within the evidence of this case.

The Court should grant certiorari in order to review these important issues. Following such a review, the Court should reverse the Seventh Circuit and remand for appropriate proceedings.

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U.S. 7th Circuit Court of Appeals

Michael L. Davis
Plaintiff-Appellant,

v.

John Zirkelbach, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Evansville Division.
No. EV 92-158-C--Gene E. Brooks, Judge.

Argued September 8, 1997--Decided July 9, 1998

Before Flaum, Diane P. Wood, and Evans, Circuit Judges.
Diane P. Wood, Circuit Judge. The plaintiff in this case has showered us with issues relating to the kinds of claims an accused person may bring against prosecutors, police, and municipalities under 42 U.S.C. sec. 1983 and related theories, after the prosecutors have dropped charges against that person. The district court disposed of all of Michael L. Davis's claims against the City of Evansville, Indiana, officials of the city, and officials of Vanderburgh County, Indiana, finding in some instances that the defendants were entitled to absolute or qualified immunity, in others that the statute of limitations barred Davis's claims, and in others that there was simply no right on which to recover. For the reasons that follow, we

agree with the district court that the defendants were entitled to judgment in their favor, and we therefore affirm.

I

The charges against Davis arose out of the suspicions of his employer, Michael May, that Davis was selling drugs from May's used car lot. Taking matters into his own hand in a way that led to numerous later complications, May decided to tap Davis's office telephone. The tap yielded a tape recording in which Davis could be heard discussing the sale of five pounds of marijuana with Jeannette Duncan. May turned the tape over to Officer Richard Whitlow, a narcotics officer with the Evansville police force. Immediately after listening to it, Whitlow went to his supervisor, Patti Dee Wazny, then the head of the city's narcotics division, and asked her whether the tape would be usable against Davis. Unsure herself, Wazny told Whitlow to get a formal legal opinion on whether the tape could be used. Whitlow called Christian Lenn, the deputy prosecutor responsible for giving the narcotics division legal advice, and asked him the same question. After briefly researching the issue, Lenn told the police that the tape could not be used to prosecute Davis, but, because the police had not participated in intercepting the telephone conversation, the information on it could be used to "flip" the female participant, Duncan, and convince her to become a confidential informant.

Apparently after some police pressure, Duncan did agree to cooperate with the police. On May 11, 1990, Officers Whitlow and John Zirkelbach arrested Davis on charges of controlled substance violations. About a week later, prosecutors Lenn and Jonathan Parkhurst formally initiated criminal charges against Davis under Indiana's drug laws. On September 12, 1990, the state added a charge of intimidating a

witness--Michael May, Davis's employer. Ten months later, on July 30, 1991, the state dismissed the criminal drug charges against Davis, and in December of 1991 it also dropped the criminal intimidation charges. Davis filed the present suit on September 9, 1992.

II

As the case reaches us, Davis is pursuing claims against the following defendants: Officer Zirkelbach, Officer Whitlow, Art Gann (Chief of Police for the City of Evansville), the City of Evansville, Prosecutor Lenn, Prosecutor Parkhurst, and Stanley M. Levco (elected Prosecutor of Vanderburgh County, Indiana, during the times material to these events). In general, he claims that the prosecutor defendants (Lenn, Parkhurst, and Levco) violated his federal rights under sec. 1983 because they allowed the police to use the taped evidence, which was gathered in violation of both section 802 of the Omnibus Crime Control and Safe Streets Act of 1968 ("the Federal Wiretap Act"), 18 U.S.C. sec. 2520, and the Indiana Wiretap Statute, Ind. Code sec. 35-33.5 et seq. He also alleges that the prosecutors committed the state law torts of malicious prosecution and intentional infliction of emotional distress. With respect to the police defendants, Zirkelbach, Whitlow, and Gann, he makes essentially the same claims. Finally, he argues that the City was liable under both federal and state law based on a theory of respondeat superior liability. (He also named other defendants and raised certain other claims, but they have been dropped from the case by now.)

A. The Prosecutors

In Burns v. Reed, 500 U.S. 478 (1991), the Supreme Court drew a careful line between the vulnerability of a prosecutor

to suit for actions related to functions that are part of the judicial process, and the prosecutor's exposure for acts related to other functions, such as investigation or the giving of legal advice. It reiterated the rule that prosecutors are entitled to absolute immunity from suit for the former actions. Id. at 491-92; see also Kalina v. Fletcher, 118 S. Ct. 502, 508-09 (1997); Imbler v. Pachtman, 424 U.S. 409, 424 (1976). On the other hand, even when prosecutors are engaged in the sensitive tasks of giving legal advice to police officers, or swearing out an information to support a prosecution, the Court has held that they are entitled only to qualified immunity from suit. See Kalina, 118 S. Ct. at 510; Burns, 500 U.S. at 496. In Burns, the Court stressed the fact that "the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." Id. at 486 (citations omitted); see also Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993). On the other hand, it also observed that "the qualified immunity standard is today more protective of officials than it was at the time that Imbler was decided." Burns, 500 U.S. at 494 (footnote omitted). As we too have often had occasion to note, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. Malley v. Briggs, 475 U.S. 335, 341 (1986); Chan v. Wodnicki, 123 F.3d 1005, 1008 (7th Cir. 1997), cert. denied, 118 S. Ct. 1054 (1998); Forman v. Richmond Police Dep't, 104 F.3d 950, 958 (7th Cir.), cert. denied, 118 S. Ct. 563 (1997).

These principles underlie our evaluation of Davis's claims against the prosecutors. The district court found that Prosecutors Parkhurst and Levco had absolute immunity from all of Davis's claims against them. This was clearly correct. Davis's claims against Parkhurst and Levco arose solely from their decisions to commence and continue prosecuting him for his alleged drug and intimidation crimes. The fact that

the prosecutions in some sense may have rested on violations of the Federal Wiretap Act and its Indiana counterpart makes no difference. In Burns, the Court gave absolute immunity to prosecutors who allegedly had presented false testimony in a probable cause hearing. 500 U.S. at 491-92; see also id. at 490 n.6 (acknowledging widespread agreement that prosecutors have absolute immunity for their conduct before grand juries); Lucien v. Preiner, 967 F.2d 1166, 1167 (7th Cir. 1992) (granting absolute immunity to prosecutor who allegedly presented false evidence in an executive clemency proceeding); compare Kalina, 118 S. Ct. at 509-10 (denying absolute immunity for prosecutor who swore out a false certificate of probable cause, thus crossing the line between advocacy and participation). In Buckley, the Court reaffirmed the rule that the prosecutor is absolutely immune for acts taken in preparing for the initiation of judicial proceedings or for trial, including the professional evaluation of evidence assembled by the police. 509 U.S. at 273. This is precisely what Parkhurst and (to the extent one can say he was involved at all) Levco allegedly did: they evaluated the evidence collected by the police, including (we assume) the illegally recorded tape, and they decided to bring a judicial proceeding. Whether they were right or wrong in their evaluation of their right to use the taped evidence is of no moment. Under Imbler, Buckley, and Burns, they are entitled to absolute immunity from suit, and Davis's sec. 1983 claims against them were properly dismissed. The same result obtains under Indiana law for Davis's claims based on state law theories. See, e.g., Foster v. Pearcy, 387 N.E.2d 446 (Ind. 1979); Hupp v. Hill, 576 N.E.2d 1320, 1325 (Ind. Ct. App. 1991); see also Ind. Code sec. 34-4-16.5-3 (5) & (6).

Lenn's situation is different in one respect. Davis complains not only that Lenn participated in the initiation of the proceedings against him, but also that Lenn violated his rights

when Lenn advised Officer Whitlow that the tape could be used to "flip" Duncan. We consider only the second of these points, because Lenn is entitled to absolute immunity under both federal and state law for the acts he took to bring criminal proceedings against Davis for the same reasons his colleagues were. For purposes of federal law, Burns holds that prosecutors are entitled only to qualified immunity for their acts of giving legal advice to the police. 500 U.S. at 496. Indiana law is more generous to the prosecutor, because it has rejected the Supreme Court's distinction between prosecutorial and administrative or investigative functions for purposes of immunity, as long as the prosecutor is acting within the scope of his or her authority. Foster, 387 N.E.2d at 448-49; Hupp, 576 N.E.2d at 1325. Even if Lenn's advice about the reach of the wiretap laws was wrong, the immunity he enjoys under Indiana law is broad enough to protect him. We conclude further that even if Davis's complaint were read to assert that Lenn deliberately set out to disregard the wiretap laws, and if we assumed that such an action was outside the scope of his authority, Davis's state law claims against Lenn were properly dismissed on other grounds, which we discuss below.

1. Federal Wiretap Statute: Lenn. Ordinarily, because Lenn is entitled to qualified immunity from a suit based on the legal advice he gave to the police officers, we would ask whether his actions violated a clearly established statutory or constitutional right of which a reasonable person would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Erwin v. Daley, 92 F.3d 521, 525 (7th Cir. 1996). Qualified immunity is a threshold question that a court should resolve as soon as possible, to spare the official from the burden of defending an action. Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985); Behrens v. Pelletier, 516 U.S. 299, 306-08 (1996); Casteel v. Pieschek, 3 F.3d 1050, 1052-53 (7th Cir.

1993) ("[T]he availability of immunity in a given case should be decided as early as possible in litigation."), quoting Maxwell v. City of Indianapolis, 998 F.2d 431, 435 (7th Cir. 1993). In this case, however, Davis's suit against Lenn cannot go forward for a more basic reason: the statute of limitations. Davis had to bring his claim under the Federal Wiretap Act within two years of the time when he had "a reasonable opportunity to discover the violation." 18 U.S.C. sec. 2520(e). (It is unclear whether Davis's claim against Lenn for violating his civil rights, under sec. 1983, is properly before us, but the claim is derivative of Davis's wiretap act claim and the statute of limitations applicable under Indiana law to sec. 1983 claims is also two years. See Venter v. City of Delphi, 123 F.3d 956, 967 (7th Cir. 1997).)

Like many statutes of limitation, this one does not require the claimant to have actual knowledge of the violation; it demands only that the claimant have had a reasonable opportunity to discover it. This means that much of the parties' dispute over when precisely Davis learned that his telephone conversation had been taped is beside the point. Davis argues that he did not know for sure until September 12, 1990, when Officer Zirkelbach testified at his deposition that the tape recording existed. His suit, which was filed on September 9, 1992, fell within two years of that date, but that would be important only if actual knowledge were the standard. Much earlier than September 12 (or September 9), Davis had reason to know that something was afoot. Duncan, the other party to the conversation, told him on May 21 that the police had a tape of them talking. Davis acknowledges that this shows he knew before September that something had been taped, but he said it might have been a non-telephonic conversation. That might be, but Duncan's revelation to him was at least enough to put him on inquiry notice that his rights might have been invaded. See, e.g., Andes v. Knox, 905 F.2d

188, 189 (8th Cir. 1990) (Wiretap Act); Fujisawa Pharmaceutical Co. v. Kapoor, 115 F.3d 1332, 1334-35 (7th Cir. 1997) ('Inquiry Notice' under Rule 10b-5). We conclude, therefore, that his suit against Lenn based on the Federal Wiretap Act, and derivatively sec. 1983, is barred by the statute of limitations. Given this disposition, we have no occasion to discuss the question whether Lenn "used" or "endeavored to use" the tape for purposes of 18 U.S.C. sec. 2511(1)(d), although we note that Lenn has argued that his act of giving legal advice about the tape did not constitute "use" as a matter of law.

2. State Law Claims: Lenn. The principal state law claim that Davis has asserted against Lenn rests on the Indiana Wiretap Statute, Ind. Code sec. 35-33.5 et seq. As we said before, under Indiana's more generous approach to prosecutorial immunity Lenn cannot be held liable for giving erroneous legal advice about the ways in which the tape could or could not be used, as long as he was acting within the scope of his authority. Assuming for the sake of argument that Davis could show that Lenn had strayed beyond the scope of his authority or that the Indiana Wiretap Statute abrogated that immunity, Davis's claim runs aground on another problem. The effective date of the Indiana Wiretap Statute was July 1, 1990. See Ind. Code sec. 1-1-3- 3(b). The interception took place in May, 1990, before that date. Davis argues that his suit was timely because disclosure took place after the effective date of the law, as late as September 1990. He relies on language in the statute describing when an action may be brought, which allows someone to sue within two years from "the date that the interception, disclosure, or use of a communication in violation of this article initially occurs whichever is later." Ind. Code sec. 35-33.5-5-4(d). For limitations purposes, we agree that this statute looks a bit confusing, and that it indeed appears to permit the statute of limitations

period to begin running at the latest of the date of inappropriate interception, disclosure, or use of a communication. But there is a fundamental problem with Davis's position, which is that the interception itself did not violate the statute at the time it took place, because the statute had not yet taken effect. Davis grants that the interception did not violate the act, and that the first "use" of the communication was in July, more than two years before he filed suit. He argues that disclosure still took place less than two years before this litigation commenced, relying on the somewhat obscure way in which the statute identifies the time when the period of limitations begins to run. But no disclosure in violation of the statute ever occurred, since Ind. Code sec. 35- 33.5-5-1 limits only disclosures of "interception[s] under this article." As there was no interception governed by the Indiana Wiretap Statute, there can be no disclosure of any such interception, and thus Davis has no claim under the law.

B. The Police

We can dispose quickly of Davis's claims against Chief of Police Gann. It is enough to recall that there is no respondeat superior liability under sec. 1983. Monell v. Department of Soc. Servs., 436 U.S. 658, 690-91 (1978); Baskin v. City of Des Plaines, 138 F.3d. 701 (7th Cir. 1998). Davis has made no showing that Gann had any knowledge whatever about this particular incident; thus, he cannot show that Gann intentionally violated his constitutional rights. The same result follows for Davis's claim against Gann under the Federal Wiretap Act. That law permits an aggrieved person to sue "the person or entity" that has engaged in a violation of the statute. 18 U.S.C. sec. 2520(a). This language is sufficiently similar to that of sec. 1983 that we believe the same principles should apply: that is, a "person" should not be liable merely on respondeat superior grounds, but only when he or

she has personally engaged in a violation of the act, and an entity should be liable only if it has a policy or practice that make it reasonable to attribute the violation to the entity. Cf. Board of County Comm'rs v. Brown, 117 S. Ct. 1382, 1388 (1997). Davis dismissed his state tort claims against Gann prior to this appeal, and they are therefore not before us. Finally, his claim against Chief Gann under the Indiana Wiretap Statute fails for the same reason the claim could not proceed against Lenn.

With respect to Officers Zirkelbach and Whitlow, the most important issue we must discuss is their qualified immunity from suit for the claims based on sec. 1983 and the Federal Wiretap Act. The district court found that their use of the tape was a clear violation of established law, but that the officers were protected by the "extraordinary circumstances" exception to the lack of immunity that was first identified in Harlow, 457 U.S. at 819. We agree that this is the proper focus of the officers' immunity argument. In Harlow, the Supreme Court explained its scope as follows:

If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Id. at 818-19. Although this court has not had occasion to consider the way in which advice of counsel might support a claim of extraordinary circumstances, cf. Tangwell v. Stuckey, 135 F.3d 510, 512 n.3 (7th Cir. 1998) (not reaching "advice of counsel defense" since officer's conduct was

otherwise entitled to qualified immunity), the Tenth Circuit has done so in V-1 Oil Co. v. Wyoming, 902 F.2d 1482 (10th Cir. 1990). In that case, the court drew a distinction between routine advice of counsel and the more unusual situations in which such advice would objectively support a claim of qualified immunity:

> The circumstance most often considered for treatment as "extraordinary" is reliance upon the advice of counsel. Of course such reliance is not inherently extraordinary, for few things in government are more common than the receipt of legal advice. Still, reliance on the advice of counsel in certain circumstances rises to the level of extraordinary circumstances. . . . Relevant factors include how unequivocal, and specifically tailored to the particular facts giving rise to the controversy, the advice was, whether complete information had been provided to the advising attorney(s), the prominence and competence of the attorney(s), and how soon after the advice was received the disputed action was taken.

Id. at 1488-89 (internal quotations, citations, and footnotes omitted). See also Hollingsworth v. Hill, 110 F.3d 733, 740-41 (10th Cir. 1997); Buonocore v. Harris, 134 F.3d 245, 252-53 (4th Cir. 1998) (reliance on counsel's advice is a factor in whether a defendant has demonstrated extraordinary circumstances, but is not alone enough).

These factors support the district court's decision to grant qualified immunity to Officers Whitlow and Zirkelbach. They went to Lenn, the lawyer specifically responsible for giving advice to the narcotics division in the police force. He gave them precise advice about the way this particular tape could be used, which took into account the circumstances of how it had been made, who had been responsible for the intercept, and how the police had received it. Lenn imposed limits on

their use of the tape-- permitting use to convince Duncan to cooperate, but not direct use--which the officers respected. Cf. Buonocore, 134 F.3d at 253 (where official failed to follow legal advice he could not rely on it to establish entitlement to qualified immunity). They acted promptly after receiving the advice. Finally, the police had no reason to believe that Lenn's advice was erroneous. The Supreme Court itself has drawn a line in many contexts between permissible uses of evidence collected in violation of the Constitution, in which it has banned use for direct purposes but has permitted it for impeachment or other indirect purposes. See, e.g., Michigan v. Harvey, 494 U.S. 344, 350 (1990) (testimony obtained despite violation of Sixth Amendment right to counsel); Harris v. New York, 401 U.S. 222, 224 (1971) (testimony obtained in violation of Miranda rights); Walder v. United States, 347 U.S. 62, 65 (1954) (evidence obtained in violation of the exclusionary rule); United States v. Havens, 446 U.S. 620 (1980) (same). This indicates that the officers were objectively reasonable in their reliance on Lenn's advice. A contrary conclusion on these facts would create perverse incentives for police officers faced with an unusual problem: if they sought advice of counsel that turned out to be wrong, they would be liable, but if they maintained a deliberate ignorance, they might be able to get away with arguing that no reasonable officer would have known that the rule applied to their particular situation. Cf. Anderson v. Creighton, 483 U.S. 635, 641 (1987). Neither Harlow nor any other Supreme Court decision of which we are aware compels us to reach such an undesirable solution. Officers Whitlow and Zirkelbach are therefore entitled to qualified immunity for the federal claims that have been brought against them.

Davis also originally included claims against Whitlow and Zirkelbach under the Indiana Wiretap Statute and under state law tort theories of malicious prosecution and

intentional infliction of emotional distress. Davis has conceded that his claim of malicious prosecution against the police is no longer "applicable," which we take to mean is no longer in the case. He dismissed his claim of intentional infliction of emotional distress against the police prior to taking this appeal, and thus it too is no longer before us. Finally, his claim under the Indiana Wiretap Statute against the police fails for the same reasons it cannot succeed against Lenn: the Act was simply not in effect at the time of the interception, which means that for state law purposes the tape was not unlawfully collected and that there was nothing improper about its use.

C. The City of Evansville

The only remaining claims against the City are those under the Federal Wiretap Act, sec. 1983, and the Indiana Wiretap Act. For the reasons we have already discussed, all three of these claims were properly dismissed. Davis has alleged nothing to suggest that the City had a policy or practice of unlawfully using intercepted communications in violation of the Federal Wiretap Act. Under Monell and Brown, this is enough to doom his sec. 1983 claim. It also shows that the "entity" known as the City of Evansville did not itself engage in a violation of the Federal Wiretap Act, because we have held that the same principles of respondeat superior that govern entity liability under sec. 1983 should be applied to that statute. Once again, his claims under the Indiana Wiretap Act collapse because it was not in effect at the pertinent time.

Davis may be unhappy that he became a suspect in a drug case that was investigated by the Evansville authorities, but the fact that he was investigated does not inevitably mean that any of those authorities, or the City itself, violated his

statutory or constitutional rights. To the contrary, under the facts of this case we agree with the district court that neither the prosecutors, the police, nor the City itself is liable to Davis for the actions that were taken in conjunction with his investigation or prosecution. We therefore AFFIRM the judgment of the district court in all respects.

(Footnotes Trail Order)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION
CAUSE NO. EV 92-158-C

MICHAEL L. DAVIS,

Plaintiff,

vs.

JOHN ZIRKELBACH, RICHARD WHITLOW, ART GANN, as Chief of Police for the City of Evansville, Indiana, MICHAEL D. MAY, the CITY OF EVANSVILLE, INDIANA, CHRISTIAN M. LENN, JONATHAN J. PARKHURST, ROBERT J. PIGMAN, as Prosecuting Attorney for Vanderburgh County

Defendants.

ORDER

This matter comes before the Court on Defendants Christian Lenn; Jonathan J. Parkhurst; Robert J. Pigman, as Prosecuting Attorney for Vanderburgh County; Stanley Levco, as Prosecuting Attorney for Vanderburgh County;

and Vanderburgh County, Indiana's Motion to Dismiss filed 4 November 1992. The Court being duly advised and of the opinion that the Motion should be granted, it is

ORDERED that oral argument is DENIED,

ORDERED that the Motion to Dismiss is GRANTED,

ORDERED that Christian Lenn; Jonathan J. Parkhurst; Robert J. Pigman, as Prosecuting Attorney for Vanderburgh County; Stanley Levco, as Prosecuting Attorney for Vanderburgh County; and Vanderburgh County, Indiana are dismissed as Defendants this 18th day of February 1993 in Evansville, Indiana.

GENE. E. BROOKS, CHIEF JUDGE
'UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF INDIANA

MEMORANDUM

This matter comes before the Court on Defendants Christian Lenn; Jonathan J. Parkhurst; Robert J. Pigman, as Prosecuting Attorney for Vanderburgh County; Stanley Levco, as Prosecuting Attorney for Vanderburgh County; and Vanderburgh County, Indiana's Motion to Dismiss filed 4 November 1992.

These five Defendants (Prosecutors) argue that they are entitled to absolute immunity for the acts alleged in the Complaint. The two paragraphs concerning the Prosecutors states:

> 18. That on May 17, 1990, Defendants Christian M. Lenn and Jonathan J. Parkhurst, as deputy prosecuting attorneys for Vanderburgh County, Indiana, commenced and thereafter continued a criminal prosecution against Plaintiff for said alleged violations in the Vanderburgh Circuit Court, under cause number 82C01-9005-CF-8103.
>
> 19. That in so commencing and continuing said prosecution, Defendants Lenn and Parkhurst knew of said taped conversation between Plaintiff and Duncan, and also knew how the recording had been obtained, but did not reveal the same to said court.

Complaint at 4[1]

As Judge McKinney explained in *R v. Lawler*, 718 F.Supp. 1396 (S.D.Ind. 1989), prosecutors have absolute immunity for acts committed in the scope of their prosecutorial duties. Here the only acts alleged are clearly

within the scope of their prosecutorial duties ("commenced and thereafter continued a criminal prosecution against Plaintiff'). Prosecutors' alleged knowledge (see ¶19) is also not outside the scope of their prosecutorial duties.

Plaintiff answers he "is unaware at what stage the Defendant prosecutors first became involved with the unauthorized wiretap at issue here." Plaintiffs Answer Brief at 2. Nevertheless, the Complaint does not allege any investigatory or administrative actions which would be governed by qualified immunity regardless of what stage the Prosecutors first became involved. On a 12(b)(6) motion to dismiss, this Court must read the Complaint and determine whether it states a claim for which relief can be granted. Here, it does not.

Done this 18 day of February 1993 in Evansville, Indiana.

GENE E. BROOKS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

Footnotes

[1] Defendants Pgiman, Levco, and Vanderburgh County are sued only vicariously (Complaint at Par. 28).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION
CAUSE NO. EV 92-158-C

MICHAEL L. DAVIS,

Plaintiff,

vs.

JOHN ZIRKELBACH; RICHARD WHITLOW; ART GANN, as Chief of Police for the City of Evansville Indiana; MICHAEL D. MAY; the CITY OF EVANSVILLE, INDIANA; and CHRISTIAN LENN,

Defendant.

ORDER

This matter is before the Court on Defendants Zirkelbach, Whitlow, Gann and the City of Evansville's Motion for Summary Judgment and supporting documents filed June 14, 1994. The plaintiff, Michael L. Davis, filed the Affidavits of Michael L. Davis, Michael J. Danks and Marie E. Goodall on July 2, 1994. A Brief in Opposition to the instant motion was filed by plaintiff on July 6, 1994. An Authentication of Copy of Sworn Statement, as well as the sealed depositions of John Zirkelbach and Richard Whitlow, were filed by plaintiff on July 8, 1994. The Statement of Jeanette Duncan was filed by plaintiff on July 15, 1994.

Defendant's Reply Brief was filed July 26, 1994.
The Court, being duly advised, hereby GRANTS IN PART the Defendants' Motion for Summary Judgment, and the plaintiff's claims against defendants John Zirkelbach and Richard Whitlow under the Fourth, Fifth and Ninth Amendments; and all plaintiff's claims under federal law against Chief of Police Art Gann and the City of Evansville are DISMISSED. The case remains pending against officers Zirkelbach and Whitlow under the Federal Wiretap Act and against all of these defendants on the state law claims found at paragraphs 33, 36 and 37 of the Amended Complaint. The case also remains pending as to defendants Michael D. May and Christian Lenn under the appropriate portions of the Amended Complaint

IT IS SO ORDERED this 16th day of December, 1994, at Evansville, Indiana.

GENE E. Brooks, Judge
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

cc: Distribution to all Counsel of Record

(Footnotes Trail Opinion)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION
CAUSE NO. EV 92-158-C

MICHAEL L. DAVIS,

Plaintiff,

vs.

JOHN ZIRKELBACH; RICHARD WHITLOW; ART GANN, as Chief of Police for the City of Evansville, Indiana; MICHAEL D. MAY; the CITY OF EVANSVILLE, INDIANA; and CHRISTIAN LENN,

Defendant.

MEMORANDUM

This matter is before the Court on Defendants' Motion for Summary Judgment and supporting documents filed June 14, 1994.1 The plaintiff, Michael L. Davis, filed the Affidavits of Michael L. Davis, Michael J. Danks and Marie E. Goodall on July 2, 1994. A Brief in Opposition to the instant motion was filed by plaintiff on July 6, 1994. An Authentication of Copy of Sworn Statement, as well as the sealed depositions of John Zirkelbach and Richard Whitlow, were filed by plaintiff on July 8, 1994. The Statement of

Jeanette Duncan was filed by plaintiff on July 15, 1994. Defendant's Reply Brief was filed July 26, 1994.

STATEMENT OF RELEVANT FACTS

In May of 1990, defendant Michael D. May contacted the Evansville Police Department and brought to officer Richard Whitlow's attention (through police officer Green) a tape recording which was made on his business telephone. (Whitlow Depo. at 13.) The recording was of a conversation between the plaintiff, Michael Li Davis (who was May's business associate), and Jeanette Duncan which was made without the consent of either of them and which contained discussions about a possible drug sale. (Aff. of Davis, ¶ 1; Whitlow Depo. at 6-8.) There is a dispute of fact over whether May made the tape recording himself, or whether the tape was made with the prior knowledge or instruction of some member of the Evansville Police Department. We must assume for purposes of this summary judgment motion that May made the tape with the knowledge or assistance of two members of the Evansville Police Department whose names are unknown.[2]

After receiving the tape from May, officer Whitlow and his immediate supervisor, Lt. Patti Dee Wazny of the Narcotics Division, believed that the tape which May brought to them was made without the participants' consent. They were uncertain as to whether the police department could lawfully use the tape recording made by May in any criminal investigation. (Whitlow Depo. at 17.) They immediately sought the legal advice of a deputy prosecutor assigned to a special program to work with narcotics officers. (Whitlow Depo. at 14; Aff. of Wazny at 2-3; Aff. of Lenn at 1.) Officer Whitlow contacted Deputy Prosecutor Christian M. Lenn with the Drug Law Enforcement Program, and

sought legal advice concerning use of the tape. (Whitlow Depo. at 16; Aff. of Lenn at 1-2.) After about one-half hour of research, Deputy Prosecutor Lenn subsequently advised Officer Whitlow and Lt. Wazny that the tape recording made by May could be used to "flip" the female suspect, Duncan, who was one of the participants to the taped telephone conversation.[3] (Whitlow Depo. at 16; Aff. of Lenn at 2; Aff. of Wazny at 3.) Duncan was subsequently contacted and confronted with the tape recording of her conversation with the plaintiff. (Zirkelbach Depo. at 23.) Duncan then participated in the investigation, in order to conceal from her husband and family her participation in these matters. (Id.) Subsequently, Duncan became a confidential informant, and purchased drugs from Davis in connection with the Evansville Police Department's narcotics investigation. (Zirkelbach Dep. at 26-27.) As a result of Duncan's purchase of drugs from Davis, Officers Zirkelbach and Whitlow obtained a search warrant for Davis' residence. Subsequent to the search warrant and search, Davis was arrested by the Evansville Police Department on May 11, 1990, for alleged violations of controlled substance statutes. (Zirkelbach Depo. at 30-32; Aff. of Davis, ¶ 5.) Davis was formally charged in Vanderburgh Circuit Court with controlled substance law violations on May 17, 1990. (Aff. of Davis, ¶ 5; Amended Complaint, ¶ 4.) On September 11, 1990, another arrest of Davis resulted in an additional criminal prosecution in the same Court for allegedly intimidating May after the first arrest. (Aff. of Danks, ¶ 7; Amended Complaint, ¶ 28.) The controlled substance prosecution and the intimidation prosecution were dismissed on the State of Indiana's motion on July 30, 1991, and on December 10, 1991, respectively. (Aff. of Danks, ¶¶ 7, 10; Amended Complaint, ¶¶ 27-28.) It is on the use of the tape recording and the subsequent arrests and prosecutions that Davis bases his claims for damages.

(Complaint, ¶¶ 33-37.)

Other facts which are relevant to this Court's decision include the fact that in July of 1990, Davis made a complaint to a superior officer in the Evansville Police Department concerning the actions of Zirkelbach, Whitlow and other officers. No disciplinary action whatever was ever taken against any officer as a result of Davis' complaint. (Aff. of Davis, ¶ 9; Zirkelbach Depo. at 47-48; Whitlow Depo. at 41-42, 45-47.)

DISCUSSION

Plaintiff's Amended Complaint seeks damages alleging both federal and state law causes of action. These causes of action arise out of arrests and criminal prosecutions which he endured between May of 1990 and December of 1991. He brings his federal claims seeking damages under the Federal Wiretap Act under 18 U.S.C. § 2520 et seq. he also seeks recovery for violations of his civil rights under 42 U.S.C. § 1983. (Amended Complaint, ¶1 33, 34.) He brings state law claims for violation of a state wiretap law found at I.C. 35-33.5-5-4, malicious prosecution and intentional infliction of emotional distress. (Amended Complaint, ¶¶ 33, 35-37.)

Defendants include May, plaintiff's former business partner, and other defendants who have been dismissed.' At issue in this motion are plaintiff's claims against two police officers (Zirkelbach and Whitlow), the Chief of Police (Gann) and the City of Evansville.

Under Federal Rule of Civil Procedure 56, a party is entitled to summary judgment if "the pleadings, depositions,

answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Before the movant is entitled to summary judgment he must carry the burden of establishing that there is no existing genuine issue of material fact. Matsushita Electrical Industrial Co. v. Zenith Radio Corp. 475 U.S. 574 (1986); Jakubiec v. Cities Service Co., 844 F.2d 470, 473 (7th Cir. 1988). After the moving party has met this burden, "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial'." Matsushita, 475 U.S. at 587 [emphasis in original]; see McMillian v. Svetanoff, 878 F.2d 186, 188 (7th Gin 1989) ("A party faced with a motion for summary judgment who bears the burden of proof on a particular issue may not rest on its pleadings but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact for trial"). A material question of fact is a question which will be outcome determinative of an issue in that case. Wainwnight Bank v. Railroadmens Federal Savings, 806 F.2d 146 (7th Cir. 1986). Summary judgment is only appropriate, however, whenever the "record taken as a whole could not lead a trier of fact to find for the nonmoving party, [and] there is no 'genuine issue for trial" Id.

The Court's inquiry into whether a governmental official is shielded from liability for his acts is guided by pertinent decisions by the United States Supreme Court and Seventh Circuit Court of Appeals. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). To

determine whether an official's conduct violates clearly established law requires a two-step inquiry. First, the plaintiff must show that the law was clearly established when the challenged conduct occurred. In this Circuit, we ask "whether the law was clear in relation to the specific facts confronting the public official when he or she acted." Apostol v. Landau, 957 F.2d 339, 341 (7th Gin 1992). Second, we evaluatethe objective legal reasonableness of the defendants' conduct. We inquire whether reasonably competent officials would agree on the application of the clearly established right to a given set of facts. Id. at 341; see also Henderson v. DeRobertios, 940 F.2d 1055, 1059 (7th Cir. 1991), cert. denied. 112 S.Ct. 1578 (1992).

For purposes of analyzing the qualified immunity issues here involved, we will address the plaintiff's claims against Zirkelb ach and Whitlow separately from plaintiff's claims against Gann and the City of Evansville.

I. The Zirkelbach and Whitlow Claims

The Court's inquiry into the Defendants Zirkelbach and Whitlow immunity must look to two separate sets of activities by the defendants. The first set of activities concern the installation of a tape recording device on the plaintiff's business telephone on which device his telephone conversation was recorded without his consent, and without any warrant approving the procedure. The second set of activities concerns the use of the tape recording after it had been obtained by Zirkelbach and Whitlow.

The defendants, in this summary judgment motion, raise the defense of qualified immunity. The defendants

appear to argue that they are immune from liability for all of their actions described in plaintiff's Amended Complaint. We believe that each set of activities results in a slightly different analysis in the application of the qualified immunity doctrine.

A. The Installation of the Tape Recording Device

Under paragraph 34 of the Amended Complaint, plaintiff alleges that his rights under the Fourth Amendment against unreasonable searches and seizures, his rights under the Fifth Amendment against self-incrimination and to due process of law, and his rights to privacy under the Ninth Amendment (all as made applicable against these defendants by the Fourteenth Amendment) have been violated by the conduct of these two defendants. We believe the conduct of these two defendants under this paragraph of the Amended Complaint is related to the allegations that Zirkelbach and Whitlow installed the recording device in the plaintiff's place of business.

Plaintiff suggests that he has a right to privacy under the Ninth Amendment. Our review of the cases which discuss the Ninth Amendment does not find any case that establishes that the interception of communications from a person's business telephone violates that Amendment. The Court concludes that there is no clearly established law that obtaining or using an intercepted oral communication violated the Ninth Amendment, and defendants Zirkelbach and Whitlow are entitled to qualified immunity for claims based upon that Amendment.

Plaintiff further suggests that his rights under the Fifth Amendment were violated by the recording of his conversation. We find no case with analogous facts which

concludes that the use of a tape recording surreptitiously obtained without the consent of its participants violates the Fifth Amendment. Case law that does discuss the Fifth Amendment indicates that before a person's Fifth Amendment rights are violated by police conduct, the law enforcement technique must be so outrageous that it is fundamentally unfair and "shocking to the universal sense of justice mandated by the Due Process Clause." United States v. Russell. 411 U.S. 423, 432 (1973). In determining whether such conduct exists, the "totality of the circumstances" must be considered with no single factor controlling. Police misconduct amounts to a violation of due process only in the rarest and most outrageous circumstances. United States v. OFSHE. 817 F.2d 1508, 1516 (11th Cir. 1987).

In OFSHE, a defendant's attorney, who was cooperating with federal law enforcement agents because of an investigation of the attorney's own criminal activities, allowed federal agents to place a "body bug" upon his person and allowed his conversations with his client to be transmitted to police. This interception, though described as "outrageous," was determined not to violate the Fifth Amendment Due Process Clause when the information obtained through the "body bug" was determined not to be relevant to the defendant's case, or was related only to motions which were part of the public record.

In this case, no use of the information obtained by the tape recording was made at trial because Davis' case was dismissed before trial. To the extent the tape was used to lead the police to question Duncan, we conclude that such conduct is not so outrageous that it is shocking to the universal sense of justice.

Even if it were concluded that the officers' conduct could be determined to be outrageous, we do no find sufficient law to show that it was clearly established in 1990 that use of the tape to decide to investigate Duncan and/or Davis would violate the Fifth Amendment. We believe that Zirkelbach and Whitlow are therefore entitled to invoke the doctrine of qualified immunity as to any claims based upon the Fifth Amendment.

Plaintiff also claims that his rights under the Fourth Amendment were violated by the police conduct in the installation of the tape recording of his conversation.[5] The Fourth Amendment "affords protection against the uninvited ear." "Oral statements, if overheard, and their fruits are subject to suppression." Alderman v. United States, 394 U.S. 165, 171 (1969). A Fourth Amendment violation can occur when a person's privacy is invaded even without physical penetration of a "constitutionally protected area." Katz v. United States. 389 U.S. 347, 351 (1967). A violation of the Fourth Amendment is particularly clear when eavesdropping is accomplished by physical intrusion into an area in which a person has a reasonable expectation of privacy. Silverman v. United States. 365 U.s. 505, 509-10 (1961). Under this authority and the facts of this case (which we must accept as true for purposes of this motion), the Court concludes that some Evansville police officers who "installed a wiretap" (Aff. of Goodall, ¶ 6) without appropriate warrant violated a clearly established Fourth Amendment right to be free from an unreasonable search and seizure. There is, however, insufficient evidence to create a genuine issue' of fact as to whether Zirkelbach, Whitlow or Gann were the police officers who assisted May in the placement of the tape recording device.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, also known as the Federal Wiretap Act (18 U.S.C. §§ 2510-2521), was clearly established law in May of 1990. The prohibitions of the Act affecting the City defendants read as follows in May of 1990:

> (1) Except as otherwise specifically provided in this chapter any person who-
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> (b) intentionally uses, endeavors to use, or procures any person to use any electronic, mechanical, or other device to intercept any oral communication when-
>
> (i) Such device is affixed to, or otherwise transmits a signal through, a wire, cable or other like connection used in wire communication; or
>
> * * ***
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through interception of a wire, oral, or electronic communication in violation of this subsection; or
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic

communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511 (1988). The original version of the Act was the same as to these provisions, except that the word "willfully" rather than "intentionally" was used, and the words "or electronic" were inserted in subsections (l)(a), (l)(c) and (1)(d). 1 U.S. Code Cong. & Ad. News, 90th Cong., 2d Sess. 253, 255-56 (1968)

Under the facts of this case, and at the time of Zirkelbach and Whitlow's conduct, the federal wiretap law clearly prohibited "use of" and "intentional disclosure of" the intercepted communication or the "contents" of the communication. Therefore, when Zirkelbach and Whitlow used the contents of the tape recording (regardless of whether they participated in obtaining the tape originally), which they believed was made without the consent of either individual to the conversation, to "flip" Duncan, the law was clear in relation to these facts that such use of the contents violated the Federal Wiretap Act.

The federal wiretap law being a well established law, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove he neither knew nor should have known of the relevant legal standard, the defense should be sustained. Harlow v. Fitzgerald, 457 U.S. at 818-19. Whether legal advice given to a defendant constitutes "extraordinary circumstances" depends upon the circumstances of each case. As its name suggests, the

"extraordinary circumstances" exception rarely applies to keep a qualified immunity defense from failing where the defendant violated a clearly established right. The circumstances must be such that the defendant was so "prevented" from knowing that his actions were unconstitutional that he should not be imputed with knowledge of a clearly established right. And, proving such a defense is the burden of the defendant relying on it.

Among the relevant factors for determining when legal advice satisfies the "extraordinary circumstances" exception, are: "how unequivocal, and specifically tailored to the particular facts giving rise to the controversy, the advice was"; "whether complete information had been provided to the advising attorney[s]"; "the prominence and competence of the attorney[s]"; and "how soon after the advice was received the disputed action was taken." Cannon v. City and County of Denver, 998 F.2d 867 (10th Cir. 1993)

Zirkelbach and Whitlow deny that they had anything to do with the installation of the device in plaintiff's place of business. Much of their description of events in how they obtained the tape from defendant May seems corroborated by other affidavits. There is only one piece of evidence which contradicts their version of events as to how the tape came into existence, and whether Zirkelbach and Whitlow installed the tape recording device. Paragraph 6 of Marie Goodall's affidavit indicates that co-defendant May made a statement to her on an undetermined date that "May and two officers of the EPD had installed a wiretap on the telephone used by Davis" at his place of business, and that when giving the statement "May named the officers involved" but that Goodall "cannot now recall the names given by May."

The Court concludes that this evidence establishing Zirkelbach and Whitlow as participants in the installation of the tape recording device is an extremely tenuous admission by defendant May upon which to rest liability. This evidence is made even more tenuous by the undisputed fact that May's whereabouts are unknown, and that he is a fugitive from the legal system himself. We believe that the single paragraph of Marie Goodall's affidavit (which does not even establish that Zirkelbach and Whitlow were the officers who assisted May in the installation of the device), made by a person whose whereabouts are unknown, about a conversation held at an indeterminable date or place, is insufficient to create a genuine issue of fact about whether Zirkelbach and Whitlow were the two officers who participated in the installation of the tape recording device.[6] The case law which instructs this Court on how to construe when a genuine" issue exists requires that an opponent do more than show there is some "metaphysical" doubt as to the material facts. When the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. Matsushita, supra. We believe that the record as a whole could not lead a rational trier of fact to find that Zirkelbach and Whitlow installed the recording device. Therefore defendants Zirkelbach and Whitlow are entitled to an

order granting their Motion for Summary Judgment because there is no genuine issue of fact as to whether they participated in the installation of the tape recording device. Because they did not install the tape recording device, there is no claim against them under either federal cause of action for installation of the device

B. The Use of the Recorded Conversation

In paragraph 33 of the Amended Complaint, the defendants' use of the tape recorded conversation is alleged by the plaintiff to violate the Federal Wiretap Act. We have concluded that under the facts of this case, as we must currently accept as true, Officers Zirkelbach and Whitlow did in fact violate the Federal Wiretap Act, which was a clearly established federal statute at the time of their actions. As discussed above, however, Harlow does establish that the defense of qualified immunity may still be interposed under extraordinary circumstances, and we believe these circumstances can include good faith reliance on the advice of counsel. The facts in this case show that both Whitlow and his superior, Lt. (now Capt.) Wazny, were aware of the basic parameters of the federal wiretap law when they came into possession of this tape. They immediately went to the legal counsel who was responsible for drug enforcement and who was knowledgeable in the area. A meeting occurred with the prosecutor after he had done some research, but only about one half hour or less. We conclude that the facts have not been developed sufficiently to allow this Court to conclude that the exceptional circumstances doctrine should apply here. The completed factual record may lead the fact-finder to a decision that qualified immunity is appropriate here. However, that decision cannot be made as the facts are developed to date. Therefore, the Court must deny the Motion for Summary Judgment to the extent that it seeks a declaration that officers Zirkelbach and Whitlow are entitled to the protection of the doctrine of qualified immunity.

II. The Claims against Chief of Police Art Gann and the City of Evansville

Paragraph 5 of the Amended Complaint seeks relief against Art Gann, "now the Chief of Police for the City of Evansville, Indiana." The Amended Complaint does not allege any personal participation by Gann, and paragraph 30 indicates that he is sued "to the extent [he] or the governmental unit [he] represents are liable for the actions of the individual defendants." As to the federal claims here presented, it is well established that there can be no respondeat superior liability by the municipality for actions brought pursuant to 42 U.S.C. § 1983, Monell v. Department of Social Services, 436 U.S. 658 (1978), and there is no evidence of record that the acts complained of are a part of a custom, policy or practice of the City so as to impose liability upon the municipality. See Oklahoma City v. Tuttle, 471 U.S. 808 (1985).

The only other federal claim arguably made against Gann is that after Davis filed a complaint against these officers, no disciplinary action was taken against either officer. However, this Court is unaware of any right guaranteed by the United States Constitution or any federal statute which requires that officers be internally disciplined for improper actions. The plaintiff has not submitted any authority, and we can find no cause of action to be stated which is cognizable under 42 U.S.C. § 1983. The Court therefore considers the facts involving the failure to discipline as evidentiary facts relevant to the issue of whether there can be imputation of liability to the City by some type of ratification of the officers' actions, in the supplemental state law claims. But there is no federal law issue presented for these officers.

We are presented with a more difficult issue of determining whether a municipal entity such as the City of Evansville can be held liable for violations of the Federal Wiretap Act under a theory akin to respondeat superior. The Court finds no law directly addressing this issue. The Court believes that the policy reasons which support the decision to deny respondeat superior liability in actions brought under 42 U.S.C. Sec. 1983 apply equally to claims brought under the Federal Wiretap Act. Neither is there any indication that the actions about which plaintiff complains were taken pursuant to any custom, policy or practice of the City. It is clear that any actions taken in the use of the tape recording device were done under authority of a deputy prosecuting attorney, and not pursuant to any policy making authority of the City.

CONCLUSION

This Court therefore concludes that the plaintiff's claims under the Fifth or Ninth Amendment against defendants John Zirkelbach and Richard Whitlow are precluded by the doctrine of qualified immunity. Any claims for violation of plaintiff's Fourth Amendment rights by placing the recording device must be brought against those officers responsible for the violation, and there is insufficient evidence to create a genuine issue of fact about whether these defendants were the officers who assisted May in installing the tape recording equipment. The plaintiff's claims against officers Zirkelbach and Whitlow for their violation of the Federal Wiretap Act remain viable. Plaintiff's claims under federal law against defendant Art Gann, in his official capacity as Chief of Police for the City of Evansville, Indiana, and the City of Evansville, Indiana, are precluded because there is no evidence that Zirkelbach or Whitlow's actions were taken as a part of a custom, policy or practice of the City of Evansville, and because liability for those claims cannot attach solely through

principles of vicarious liability. Therefore, the instant Motion for Summary Judgment is

GRANTED in part, and the federal claims described above (which relate to the installation of the recording device) against officers Zirkelbach and Whitlow are DISMISSED. All federal claims against Police Chief and the City of Evansville are DISMISSED. The case remains to be pursued against officers Zirkelbach and Whitlow for violations of plaintiff's rights under tne Federal Wiretap Act, and against all of these defendants on the state law claims found at paragraphs 33, 36 and 37 of the Amended Complaint. The case also remains pending as to defendants Michael D. May and Christian Lenn under the appropriate portions of the Amended Complaint.

IT IS SO ORDERED day of December, 1994, at Evansville, Indiana.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

cc: Distribution to all Counsel of Record

Footnotes

1 The defendants on whose behalf the summary judgment motion is filed are Zirkelbach, Whitlow, Gann and the City of Evansville.

2 See Order on Motion to Strike entered June 22, 1994, and paragraph 6 of the Affidavit of Marie Goodall from which we

must accept as true Goodall's statement in this regard.

3 "Flip" means to have her become a police informant.

4 See the Order of February 18, 1993, dismissing defendants Christian Lenn; Jonathan J. Parkhurst Robert J. Pigman, as Prosecuting Attorney for Vanderburgh County; Stanley M. Levco, as Prosecuting Attorney for Vanderburgb County; and Vanderburgh County, Indiana, and the Order of May 21, 1993, dismissing defendant State of Indiana. The Court notes that the Amended Complaint alleges claims against these defendants. The Motion to Amend Complaint was filed on July 8, 1993, and was not granted until June 29,1994, which was after the February 18 and May 21, 1993 orders dismissing the claims against these defendants. Therefore, because the allegations in the Amended Complaint against all of these defendants, except Lenn, are not any different than those dealt with by the Court on February 18 and May 21, 1993, the claims against defendants Parkhurst, Pigman, Levco, Vanderburgh County, and the State of Indiana remain dismissed. The Court notes that there are new allegations in paragraphs 14 and 15 of the Amended Complaint against defendant Lenn, but that Lenn has never responded to the Amended Complaint. Therefore, the claims against Lenn remain to be resolved.

5 The Court believes that plaintiff's claim under the Fourth Amendment is limited to the installation of the recording device and the interception of the conversations. Once the tape was in existence, we believe that no further search or seizure occurred, and that any "use" of the tape thereafter falls outside the scope of the Fourth Amendment and falls within the Federal Wiretap Act.

6 Evidence of record indicates that May first brought the tape to the attention of police officer Green before Zirkelbach and Whitlow became aware of its existence. This fact may lead to the conclusion that if any officers were

involved in the installation of the tape recording device, those officers were other than Zirkelbach and Whitlow.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION
CAUSE NO. EV 92-158-C

MICHAEL L. DAVIS,

Plaintiff,

vs.

JOHN ZIRKELBACH; RICHARD WHITLOW; ART GANN, as Chief of Police for the City of Evansville Indiana MICHAEL D. MAY; the CITY OF EVANSVILLE, INDIANA; and CHRISTIAN LENN,

Defendant.

ORDER

This matter is before the Court on the Defendant Christian Lenn's Motion to Dismiss and attached Memorandum filed January 13, 1995. The Plaintiff's Brief in Response to Defendant Christian Lenn's Motion to Dismiss was filed February 1, 1995, and the Plaintiff's Supplemental Brief in Response to Defendant Christian Lenn's Motion to Dismiss was filed March 1, 1995. This Matter is also before the Court on the Plaintiff's Motion for Partial Summary Judgment and Brief in Support of Plaintiff's Motion for Partial Summary Judgment filed March 1, 1995. The Defendant Lenn's Brief in Response to Plaintiff's Motion for Summary Judgment was filed May 1, 1995. The Plaintiff's Brief in Reply to Brief of Defendant Lenn in Response to Plaintiff's Partial Motion for Summary Judgment was filed

May 11, 1995.

This Matter is also before the Court on the Defendant
Christian Lenn's Motion for Summary Judgment and Brief in Support of Lenn's Motion for Summary Judgment and Reply to Plaintiff's Brief in Response to Defendant Christian Lenn's Motion to Dismiss filed May 1, 1995. The Plaintiff's Brief in Opposition to Defendant Lenn's Cross Motion for Summary Judgment was filed May 19, 1995.

This Matter is also before the Court on the Defendants, John Zirkelbach; Richard Whitlow; Art Gann, as chief of Police for the City of Evansville Indiana; and the City of Evansville's, Cross Motion for Summary Judgment and Answer Brief of Defendants, John Zirkelbach; Richard Whitlow; Art Gann, as Chief of Police for the City of Evansville, Indiana, in Opposition to Plaintiff's Motion for Partial Summary Judgment; and Brief in Support of Defendants' Cross Motion for Summary Judgment filed May 1, 1995. The Plaintiff's Brief in Reply to Answer Brief of Defendants Zirkelbach, Whitlow, Gann and the City of Evansville; and Brief in Opposition to Defendants' Cross Motion for Summary Judgment was filed May 19, 1995.

On May 22, 1995, the Plaintiff filed a Motion to Strike Portions of Affidavits. The Defendant Lenn filed his Response to Plaintiff's Motion to Strike Portions of Affidavits on May 26, 1995. The Plaintiff's Brief in Reply to Defendant Lenn's Response to Plaintiff's Motion to Strike Portions of Affidavits was filed June 5, 1995.

After considering the foregoing, as well as the relevant case and statutory law, the Court hereby DENIES

the Plaintiff's Motion to Strike Portions of Affidavits, DENIES AS MOOT the Defendant Christian Lenn's Motion to Dismiss, GRANTS IN PART and DENIES IN PART the Defendants, John Zirkelbach; Richard Whitlow; Art Gann, as Chief of Police for the City of Evansville, Indiana; and the City of Evansville's, Cross Motion for Summary Judgment, GRANTS the Defendant Christian Lenn's Motion for Summary Judgment and DENIES the Plaintiff's Motion for Partial Summary Judgment.

IT IS SO ORDERED this 12th day of September, 1995, at Evansville, Indiana.

GENE E. BROOKS, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

cc: All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION
CAUSE NO. EV 92-158-C

MICHAEL L. DAVIS,

Plaintiff,

vs.

JOHN ZIRKELBACH; RICHARD WHITLOW; ART GANN, as Chief of Police for the City of Evansville, Indiana; MICHAEL D. MAY; the CITY OF EVANSVILLE, INDIANA; and CHRISTIAN LENN,

Defendant.

MEMORANDUM

This matter is before the Court on the Defendant Christian Lenn's Motion to Dismiss and attached Memorandum filed January 13, 1995. The Plaintiff's Brief in Response to Defendant Christian Lenn's Motion to Dismiss was filed February 1, 1995, and the Plaintiff's Supplemental Brief in Response to Defendant Christian Lenn's Motion to Dismiss was filed March 1, 1995. This Matter is also before the Court on the Plaintiff's Motion for Partial Summary Judgment and Brief in Support of Plaintiff's Motion for Partial Summary Judgment filed March 3, 1995. The Defendant Lenn's Brief in Response to Plaintiff's Motion for Summary Judgment was

filed May 1, 1995. The Plaintiff's Brief in Reply to Brief of Defendant Lenn in Response to Plaintiff's Partial Motion for Summary Judgment was filed May 11, 1995.

This Matter is also before the Court on the Defendant Christian Lenn's Motion for Summary Judgment and Brief in Support of Lenn's Motion for Summary Judgment and Reply to Plaintiff's Brief in Response to Defendant Christian Lenn's Motion to Dismiss filed May 1, 1995. The Plaintiff's Brief in Opposition to Defendant Lenn's Cross Motion for Summary Judgment was filed May 19, 1995.

This Matter is also before the Court on the Defendants, John Zirkelbach; Richard Whitlow; Art Gann, as Chief of Police for the City of Evansville, Indiana; and the City of Evansville's, Cross Motion for Summary Judgment and Answer Brief of Defendants, John Zirkelbach; Richard Whitlow; Art Gann, as Chief of Police for the City of Evansville, Indiana, in Opposition to Plaintiff's Motion for Partial Summary Judgment; and Brief in Support of Defendants' Cross Motion for Summary Judgment filed May 1, 1995. The Plaintiff's Brief in Reply to Answer Brief of Defendants Zirkelbach, Whitlow, Gann and the City of Evansville; and Brief in Opposition to Defendants' Cross Motion for Summary Judgment was filed May 19, 1995.

On May 22, 1995, the Plaintiff filed a Motion to Strike Portions of Affidavits. The Defendant Lenn filed his Response to Plaintiff's Motion to Strike Portions of Affidavits on May 26,1995. The Plaintiff's Brief in Reply to Defendant Lenn's Response to Plaintiff's Motion to Strike Portions of Affidavits was filed June 5, 1995.

Statement of Relevant Facts

In May of 1990, defendant Michael D. May contacted the Evansville Police Department and brought to Officer Richard Whitlow's attention (through Officer Green) a tape recording which was made on his business telephone. (Whitlow Depo. at 13.) The recording was of a conversation between the Plaintiff, Michael L. Davis (who was May's business associate), and Jeanette Duncan which was made without the consent of either of them and which contained discussions about a possible drug sale. (Aff. of Davis, ¶ 1; Whitlow Depo. at 6-8.) There is a dispute of fact over whether May made the tape recording himself, or whether the tape was made with the prior knowledge or instruction of some member of the Evansville Police Department. We must assume for purposes of this summary judgment motion that May made the tape with the knowledge or assistance of two members of the Evansville Police Department whose names are unknown.

After receiving the tape from May, Officer Whitlow and his immediate supervisor, Lt. Patti Dee Wazny of the Narcotics Division, believed that the tape which May brought to them was made without the participants' consent. They were uncertain as to whether the police department could lawfully use the tape recording made by May in any criminal investigation. (Whitlow Depo. at 17.) They immediately sought the legal advice of a deputy prosecutor assigned to a special program to work with narcotics officers. (Whitlow Depo. at 14; Aff. of Wazny at 2—3; Aff. of Lenn at 1.) Officer Whitlow contacted Deputy Prosecutor Christian M. Lenn with the Drug Law Enforcement Program, and sought legal advice concerning use of the tape. (Whitlow Depo. at 16; Aff. of Lenn at 1-2.) After about one-half hour

of research, Deputy Prosecutor Lenn subsequently advised Officer Whitlow and Lt. Wazny that the tape recording made by May could be used to "flip," or make a police informant of, the female suspect, Duncan, who was one of the participants to the taped telephone conversation. (Whitlow Depo. at 16; Aff. of Lenn at 2; Aff. of Wazny at 3.)

Duncan was subsequently contacted and confronted with the tape recording of her conversation with the Plaintiff. (Zirkelbach Depo. at 23.) Duncan then participated in the investigation, in order to conceal from her husband and family her participation in these matters. (Id.) Subsequently, Duncan became a confidential informant, and purchased drugs from Davis in connection with the Evansville Police Department's narcotics investigation. (Zirkelbach Dep. at 26-27.) As a result of Duncan's purchase of drugs from Davis, Officers Zirkelbach and Whitlow obtained a search warrant for Davis' residence.

Subsequent to the search warrant and search, Davis was arrested by the Evansville Police Department on May 11, 1990, for alleged violations of controlled substance statutes. (Zirkelbach Depo. at 30-32; Aff. of Davis, ¶ 5.) Davis was formally charged in Vanderburgh Circuit Court with controlled substance law violations on May 17, 1990. (Aff. of Davis, ¶ 5; Amended Complaint, ¶ 4.) On September 11, 1990, another arrest of Davis resulted in an additional criminal prosecution in the same Court for allegedly intimidating May after the first arrest. (Aff. of Danks, ¶ 7; Amended Complaint, ¶ 28.) The controlled substance prosecution and the intimidation prosecution were dismissed on the State of Indiana's motion on July 30, 1991, and on December 10, 1991, respectively. (Aff. of Danks, ¶¶ 7, 10; Amended Complaint, ¶¶ 27-28.) It is on the use of the tape

recording and the subsequent arrests and prosecutions that Davis bases his claims for damages. (Complaint, ¶¶ 33-37.)

In July of 1990, Davis made a complaint to a superior officer in the Evansville Police Department concerning the actions of Zirkelbach, Whitlow and other officers. No disciplinary action was ever taken against any officer as a result of Davis' complaint. (Aff. of Davis, ¶ 9; Zirkelbach Depo. at 47-48; Whitlow Depo. at 41-42, 45-47.)

On December 16, 1994, the Court issued an Order partially granting summary judgment in favor of the Defendants, and dismissing the Plaintiff's claims under the Fourth, Fifth and Ninth Amendments as to Defendants Zirkelbach and Whitlow, dismissing all claims brought under federal law as to Defendants Gann and the City of Evansville, Indiana.

Discussion

Plaintiff's Amended Complaint seeks damages alleging both federal and state law causes of action. These causes of action arise out of arrests and criminal prosecutions which he endured between May of 1990 and December of 1991. He brings his federal claims seeking damages under the Federal Wiretap Act under 18 U.S.C. § 2520 et seq.; he also seeks recovery for violations of his civil rights under 42 U.S.C. § 1983 ("Section 1983"). (Amended Complaint, ¶¶ 33, 34.) He brings state law claims for violation of a state wiretap law found at I.C. §35-33.5-5-4, malicious prosecution and intentional infliction of emotional distress. (Amended Complaint, ¶¶ 36, 37).

As an initial matter, a brief procedural history on the

pending motions is appropriate to clarify the issues now before the Court.

The Defendant Lenn filed a motion to dismiss on January 13, 1995, seeking the dismissal of all claims against him. He also filed a motion for summary judgment on May 1, 1995. Lenn asserts that he cannot be liable under the Indiana Wiretap Act, I.C. §35-33.5-5-1 et seq., because all acts alleged in the Amended Complaint to violate the Act occurred prior to the effective date of the Act. also claims that the Plaintiff's actions under both the Indiana Wiretap Act and Federal Wiretap Act are time barred by the Acts' respective statutes of limitation. The Defendant Lenn also asserts that he did not commit any acts which violate the substantive provisions of the Federal Wiretap Act, and that he has absolute prosecutorial immunity as to all pendent state law claims.

On March 1, 1995, the Plaintiff filed a motion for partial summary judgment, claiming that the Defendants Zirkelbach, Whitlow and Lenn are liable under the Federal Wiretap Act and Indiana Wiretap Act as a matter of law.

On May 1, 1995, the Defendants Zirkelbach, Whitlow, Gann, and the City of Evansville filed a cross motion for summary judgment. They claim that the Defendants are entitled to qualified immunity from an action under the Federal and State Wiretap Acts because they acted in reliance upon the legal opinion given by the Defendant Lenn. Like the Defendant Lenn, these, Defendants also assert that the Plaintiff's actions under the Wiretap Acts are time barred. They also claim that the Plaintiff's state tort claims are barred for failure to file a timely tort claim notice.

Finally, the Plaintiff filed a motion to strike certain portions of the affidavits of Richard Whitlow and Patti Dee Wazny.

I. Plaintiff's Motion to Strike

The Plaintiff moves the Court to strike the last three sentences of the Affidavit of Patti Dee Wazny, and paragraph 17 and Exhibit 2 to the Affidavit of Richard Whitlow. Because no party relies upon the disputed portions of the Whitlow Affidavit to support its motion for summary judgment, the Court need not presently consider the Plaintiff's arguments regarding the Whitlow Affidavit.

Turning to the Wazny Affidavit, the Court must find that the contested portions of the Affidavit are admissible and may be used as evidence in the Court's consideration of the motions presently under consideration. First, the last three sentences of the Wazny Affidavit concern statements made by the Plaintiff which are being offered against him, and thus constitute an admission by a party opponent under Federal Rule of Evidence 801(d) (2). As a result, these statements are not hearsay. Second, Davis' statements are not hearsay because they are not being offered to prove the truth of Goodall's statements, but rather for the purpose of proving that Davis told Wazny that Goodall informed him of the wiretap sometime before July 19, 1990. See F.R.E. 801(c).

After considering the foregoing, the Court hereby DENIES the Plaintiff's Motion to Strike Portions of Affidavits.

II. Defendant Lenn's Motion to Dismiss

The Defendant Lenn filed his motion to dismiss the action against him on January 13, 1995. Since that time, all parties have filed motions for summary judgment, and submitted evidentiary materials in support of their respective motions. Under Federal Rule of Civil Procedure 12(b), if a motion to dismiss for failure to state a claim for which relief may be granted is presented and matters outside the pleadings are presented to the court, the court must treat the motion as one for summary judgment and give all parties a reasonable opportunity to present all pertinent materials. Fed.R.Civ.P. 12 (b),. Because all parties have now presented motions for summary judgment to the Court for a determination of this matter and all parties have referred to and submitted matters outside the pleadings for the Court's consideration, the Court hereby DENIES AS MOOT the Defendant Christian Lenn's Motion to Dismiss.

III. Defendants Zirkelbach, Whitlow and Gann

a.Federal Law Claims

In its Order and Memorandum of December 16, 1994, this Court held that, with respect to the alleged violations of the Federal Wiretap Act, 18 U.S.C. §§2510-2521, brought against Defendants Zirkelbach and Whitlow pursuant to Section 1983:

> [T]hat the facts have not been developed sufficiently to allow this Court to conclude that the exceptional circumstances doctrine should apply here. The completed factual record may lead the fact-finder to a decision that qualified immunity is appropriate

> here. However, that decision cannot be made as the facts are developed to date.

Memorandum p.16.

After reviewing the undisputed facts of this case, the Court believes that sufficient facts have been developed such that the Court may now consider and rule upon the immunity or lack thereof of the Defendants Zirkelbach and Whitlow from liability under Section 1983.

Under Section 1983, civil liability is imposed upon every person who:

> Under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,. any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.

28 U.S.C. §1983.

Thus, liability under Section 1983 requires that:

> (1) the defendants acted under color of state law, (2) defendants' action deprived plaintiff of (his) rights, privileges or immunities granted by the Constitution and (3) defendants' conduct proximately caused the plaintiff's deprivation."

Volk v. Coler, 845 F.2d 1422, 1430 (7th Cir. 1988).

Furthermore, the Court generally must consider whether Section 1983 defendants are entitled to "qualified immunity."

In Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), the Supreme Court held "governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The Harlow test has been treated as an objective test protecting the public interest in deterrence while safeguarding the official's ability to make difficult decisions "with independence and without fear of consequences." 457 U.S. at 819; Donovan v. City of Milwaukee 17 F.3d 944, 951 (7th Cir. 1994).

The Seventh Circuit has applied the Harlow test to give the official the legal benefit of the doubt, but where the right violated is clearly established such "that a reasonable official would understand that what he is doing violates that right," the official generally is not immune. 17 F.3d at 951-52 (internal quotations omitted); accord, Rice v. Burks, 999 F.2d 1172, 1174 (7th Cir. 1993) ("Police officers who use force in making an arrest are entitled to qualified immunity from suits for damages. . .'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (quoting Harlow)). The crucial inquiry is whether the law was clear in relation to the circumstances confronting the police officer. Maxwell v. City of Indianapolis. 998 F. 2d 431, 436 (7th Cir. 1993). This places on a civil rights plaintiff the heavy burden of "establishing the existence of a clearly established constitutional right [violated]." 17 F. 3d at 951. The Seventh Circuit heightened that burden, going so far as to hold that

qualified immunity is "designed to shield from civil immunity all but the plainly incompetent or those who knowingly violate the law." Hughes v. Meyer, 880 F.2d 967, 971 (7th Cir. 1989) cert. denied, Hughes v. Buss, 495 U.S. 931 (1990) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1985)).

Even if an official violates a clearly established right, the official may be immune due to the "extraordinary circumstances" exception first recognized by the United States Supreme Court in Harlow, 457 U.S. at 818-19. As with the initial qualified immunity inquiry, an official is only entitled to immunity under the extraordinary circumstances exception if "it was objectively reasonable for [the official] to believe that his *acts* did not violate [clearly established] rights." Robinson v.Via, 821 F.2d 913, 921 (2d Cir. 1987); Harlow, 457 U.S. at 819 ("again, the defense would turn primarily on objective factors").

Although district courts in this circuit have recognized that extraordinary circumstances may entitle one to immunity from liability under Section 1983, Koser v. County of Price, 834 F.Supp. 305 (W.D. Wis. 1993); Liebenstein v. Crowe, 826 F.Supp. 1174 (E.D.Wis. 1992);O'Connor v. Chicago Transit Authority, 778 F.Supp. 967 (Ill. 1991), no court in the circuit has considered the parameters of the exceptional circumstances exception. Other courts outside this circuit have, however, applied the exception as it relates to state officials obtaining the advice of attorneys as to the legality of their conduct before engaging in conduct which violated clearly established rights.

In V-1 Oil Co. v. State of Wyoming. Dept. of Environmental quality, 902 F.2d 1482 (10th Cir. 1990), the Tenth Circuit Court of Appeals held that an official who

conducted a warrantless search in violation of the Fourth Amendment was entitled to the protection of the extraordinary circumstances exception where he sought the advise of a senior assistant attorney general, who advised him that a warrantless search was proper. While holding that reliance upon the advise of counsel does not always constitute extraordinary circumstances, such reliance does "bar our imputation to [the defendant] of constructive knowledge concerning the laws allegedly violated by his conduct" in some cases. V-1 Oil, 902 F.2d at 1489 (quoting Polson v. Davis, 635 F.Supp. 1130, 1144 (D.Kan. 1986)). In considering whether reliance on the advise of counsel should be considered extraordinary circumstances, the Court held that one should consider:

> "how unequivocal, and specifically tailored to the particular facts giving rise to the controversy, the advice was, whether complete information had been provided to the advising attorney(s), the prominence and competence of the attorney(s), and how soon after the advice was received the disputed action was taken."

V-1 Oil, 902 F.2d at 1489 (internal citations omitted).

The Tenth Circuit Court of Appeals again considered the scope of the extraordinary circumstances exception in Cannon v. City and County of Denver, 998 F.2d 867 (10th Cir.. 1993). While recognizing that the factors enunciated in V-1 Oil should govern the consideration of whether an official may invoke the exception to escape liability, the Court held that a "claim of immunity under the 'extraordinary circumstances' exception on this record presents a genuine question of material fact."

Cannon, 998 F.2d at 876 (citing Lutz v. Weld County School Dist. No. 6, 784 F.2d 340, 343 (10th Cir. 1986) ("Defendants [a]re therefore entitled to an instruction on their qualified immunity defense only by raising a fact issue as to whether there were exceptional circumstances such that a reasonable person in their positions would not have known of the relevant legal standard")); also, Czurlanis v. Albanese, 721 F.2d 98, 108 n.8 (3rd Cir. 1983) ("Since Harlow, the courts have generally decided qualified immunity as a matter of law, unless defendants have claimed extraordinary circumstances even though the law was clearly established.") (internal citations omitted). As a result, the Court held that a defense of extraordinary circumstances precludes the granting of summary judgment in favor of the defendant. Cannon, 998 F.2d at 876.

This Court disagrees with other courts' interpretation of Harlow precluding summary judgment when the defendant relies upon the extraordinary circumstances exception, especially in a case such as the present, where the circumstances under which defendants claim immunity are undisputed. The primary determination regarding qualified immunity is whether one's conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known," Harlow, 457 U.S. at 818. Similarly, the inquiry when determining whether an official is entitled to the extraordinary circumstances exception is whether an official faced with the extraordinary circumstances- in this case, being advised by one with knowledge of the law which is more reliable than his own - was reasonable in relying on the advice such that "he should not be imputed with the knowledge of an admittedly clearly established right." V-1 Oil, 902 F.2d at 1488 (quoting Robinson v. Bibb, 840 F.2d 349, 350 (6th Cir. 1988)).

In other words, the extraordinary circumstances exception inquiry falls under the second prong of the Harlow test: Was the clearly established statutory or constitutional right a right "of which a reasonable person would have known" when faced with the extraordinary circumstances. Harlow, 457 U.S. at 818. Just as the issue of whether the violated right was a "clearly established statutory or constitutional rights of which a reasonable person would have known," Harlow, 457 U.S. at 818, is a question of law for the court to decide when making the initial qualified immunity determination, the issue of whether the extraordinary circumstances made official's actions reasonable is a question of law, unless there is some dispute regarding the existence of the extraordinary circumstances on which the official bases his reliance. In that case, it may be the trier of fact's function to make a finding regarding the existence or occurrence of the extraordinary circumstances, but the determination regarding whether these circumstances constitute "extraordinary circumstances" within the meaning of Harlow are issues for the court.

In the present matter, it is undisputed that Defendant Whitlow sought the advice of the then-head of the Evansville Police Department's narcotics division before using the contents of the wiretap. (Plaintiff's Facts ¶6; Whitlow Aff. ¶9). He then contacted the Defendant Lenn, a deputy prosecutor of the Vanderburgh County Prosecutor's Office assigned to the Drug Law Enforcement Program, for advice concerning the legality of using the tape. (Amended Complaint ¶14; Plaintiff's Facts ¶7; Lenn's Proposed Facts ¶8; Whitlow Aff. ¶10). Lenn later informed Defendant Whitlow that he could use the tape to secure the cooperation of Duncan as a confidential informant against the Plaintiff. (Amended complaint ¶15; Plaintiff's Facts ¶8; Lenn's

Proposed Facts ¶9; Whitlow Aff. ¶11). The Plaintiff does not claim that Lenn was not fully informed of the relevant facts surrounding the recording of the tape, and the advice given to Whitlow appears to be unequivocable and tailored to the facts, to the extent that Whitlow was specifically informed that he could use the tape to "flip" Duncan, but the tape could not be used in a criminal prosecution Furthermore, the advice was given in the first week of May, 1990, and the illegal "use" by Officers Whitlow and Zirkelbach occurred on or about May 11, 1990. (Plaintiff's Facts ¶¶7, 10)

Faced with these circumstances, the Court must find that a reasonable officer in Zirkelbach and Whitlow's position should not be expected to have known that their action of using the tape to "flip" Duncan was a violation of the Federal Wiretap Act or Section 1983. Upon obtaining information concerning the tape, the officers sought that advice of one with legal knowledge and experience more reliable than their own, and were informed that they could use the tape without violating the law.. Rather than irresponsibly taking action which they believed could be violative of the law or Constitution without further thought or inquiry as to the consequences of their actions, in this case these officers did what the public wishes every police officer would do when they are unsure about the legality of their conduct: They sought advice from one who they thought could inform them correctly as to the applicable standards for their conduct, and they then acted according to this advice..

After considering the foregoing, the Court must find that the Defendants Whitlow and Zirkelbach cannot be held liable for civil damages under Section 1983 or the Federal Wiretap Act for their alleged use of the illegally-obtained tape.. As a result the Court hereby GRANTS IN PART the

Defendants, John Zirkelbach; Richard Whitlow; Art Gann, as Chief of Police for the City of Evansville, Indiana; and the City of Evansville's, Cross Motion for Summary Judgment and DENIES IN PART the Plaintiff's Motion for Partial Summary Judgment as they respectively apply to these claims.

b. Tort Claims

The Defendants next move for summary judgment on the Plaintiff's claims for malicious prosecution and emotional distress, contending that these claims are barred pursuant to I.C. §34-4-16.5-7, which provides in pertinent part:

> (a) Except as provided in section 8 of this chapter, a claim against a political subdivision is barred unless notice is filed . . . within one hundred eighty (180) days after the loss occurs.

I.C. §34-4-16.5(a).

It is undisputed that the Plaintiff's tort claim notice was filed on or after February 26, 1992. (Plaintiff's Brief p.11; Defendants' Brief p. 18). Likewise, it is undisputed that the Plaintiff's drug prosecution was dismissed July 30, 1991, and that his prosecution for intimidation was dismissed December 10, 1991.

The Defendants argue that the Plaintiff's notice is untimely because it was filed more than 180 days after the termination of the drug prosecution. In doing so, however, the Defendants mistakenly fail to take notice that the Plaintiff continued to be prosecuted on the intimidation charge.

This is not to say that the date on which the drug prosecution terminated is without relevance. It is well settled that the 180-day notice requirement for the tort of malicious prosecution begins to run on the date that the prosecution forming the basis for the claim terminates. Livingston v. Consolidated City of Indianapolis, 398 N.E.2d 1302 (Ind.App. 1979) (claim for malicious prosecution accrues on date that judgment is entered) As a result, the Court must find that the Plaintiff's claim for malicious prosecution as it pertains to the drug prosecution is barred for failure to file notice of the tort claim within 180 days after the loss occurred. Conversely, the Plaintiff's notice as it relates to his malicious prosecution claim for the intimidation prosecution was timely given.

Turning to the Plaintiff's emotional distress claim, the Court finds that the Plaintiff's notice was not untimely. Unlike malicious prosecution where a hard and fast date on which the claim accrues is established by the date on which the prosecution terminates -- in a case such as this where a "continuing wrong" which caused emotional distress is alleged, the date on which the loss actually occurred is quite difficult to pinpoint with any degree of accuracy. Buchonok v. Emerick, 558 N.E.2d 1092 (Ind. 1990); Follett v. Davis, 636 N.E.2d 1282 (Ind.App. 1994), reh'g denied, trans. denied. While at first glance it would appear that a cause of action for emotional distress resulting from the drug prosecution would accrue on the date of the termination of that prosecution, this is not necessarily true. It is reasonable to expect that some emotional distress damages might occur even after a prosecution ends, especially in a case where, as here, the Plaintiff alleges a campaign of prosecution against him.

In short, the Court concludes that the Plaintiff's cause of action for emotional distress for the alleged campaign of prosecution against him did not accrue prior to the termination of the intimidation prosecution on December 3.0, 1991. Therefore, his tort claims notice was timely served upon the Defendants.

After considering the foregoing, the Court hereby GRANTS IN PART and DENIES IN PART the Defendants, John Zirkelbach; Richard Whitlow; Art Gann, as Chief of Police for the City of Evansville, Indiana; and the City of Evansville's, Cross Motion for Summary Judgment

II. Defendant Lenn

a. Federal Wire Tap Act

The Defendant Lenn argues that the Plaintiff's Federal Wiretap Act claim is barred because the Plaintiff failed to file this action within the applicable statute of limitations. The statute of limitations for such a claim is pronounced at 18 U.S.C. §2520, which provides in pertinent part:

> (e) Limitation. A civil action may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

18 U.S.C. §2520(e).

After reviewing all of the evidence currently before us, the Court must conclude that the Plaintiff failed to file his complaint in this action within the applicable statute of limitations.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 prohibits the interception, use or disclosure of "the contents of any wire, oral, or electronic communication" obtained in violation of the Act. 18 U.S.C. §2511(1).

The undisputed evidence shows that the Plaintiff knew sometime in May, 1990 that a recording of his and Duncan's conversation had been intercepted. The Plaintiff stated that on May 21, 1990, Duncan told him that the Defendant Zirkelbach had a recording of him and Duncan in conversation. (Davis Depo. pp.4647, 104-106). He also has stated that in July, 1990, he complained to the Evansville Police Department about the tape recording of his conversation. (Davis Depo. pp.72-75).

The Plaintiff's basis for arguing that he filed his complaint within the applicable statute of limitations is that he did not have knowledge that the tape recording used to "flip" Duncan was a recording of a telephone conversation between he and Duncan until his arraignment on intimidation charges on September 12, 1990.

In making. his argument, however, the Plaintiff disregards the fact that regardless of whether the tape recording was made of a telephone conversation or an oral communication, it would have been in violation of the Act if neither he nor Duncan consented to the recording of the conversation. Thus, the mere fact that he may not have been informed that it was a telephonic communication that was intercepted until September 12, 1990 does not toll the statute of limitations. By his own sworn statements, the

Plaintiff was aware in May, 1990 and July, 1990 that a tape recording of a conversation between he and Duncan was made without their consent or prior knowledge. While the Plaintiff may have been "ignorant of the particular means or device or devices used to intercept and record his conversations at his business office" until September, 1990, (Davis Aff. ¶9), he knew at the earlier dates that an interception had been made and that the Defendant Zirkelbach was in possession of and using the interception against him. During this time, the Defendant was being prosecuted by the State, and thus had an opportunity to gain information regarding the nature and "particular means or device or devices used" to intercept his conversation and the person or persons responsible for intercepting, using and disclosing the contents of the communication.

There is no dispute regarding whether the Plaintiff knew in May, 1990 that an illegal interception of a communication between he and Duncan had in fact occurred. Rather than acting on the information that he had concerning the tape recording, however, the Plaintiff elected to delay until over two years after he gained this information. As a result, the Court must find that the Plaintiff's claims brought under the Federal Wiretap Act are. time-barred pursuant to 18 U.S.C. §2520(e).

After considering the foregoing, the Court hereby GRANTS IN PART the Defendant Christian Lenn's Motion for Summary Judgment and DENIES IN PART the Plaintiff's Motion for Partial Summary Judgment as they respectively apply to these claims.

b. Tort Claims

The Defendant Lenn claims that he is entitled to absolute immunity for liability under the Plaintiff's tort claims of malicious prosecution and infliction of emotional distress.

Indiana courts have long held that "when the acts of a prosecuting attorney 'are reasonably within the general scope of authority granted to prosecuting attorneys no liability [in common law or ITCA actions) will attach.'" Hupp v. Hill, 576 N.E. 2d 1320, 1325 (Ind.App. 1991) (quoting Foster v. Pearcy, 387 N.E.2d 446, 449 (Ind. 1979), cert. denied, 445 U.S. 960). Thus, unlike a Section 1983 action, where the inquiry is whether the prosecuting attorney is engaging in investigatory or administrative action, or action related to the judicial process, the inquiry for prosecutorial immunity under Indiana law is whether the prosecuting attorney was acting "reasonably within the general scope of authority granted to prosecuting attorneys." Foster, 387 N.E.2d at 449.

Indiana courts have held that a prosecuting attorney is not acting outside his scope of authority when he accompanies police officers in their execution of a search warrant, Hupp, 576 N.E.2d at 1325-26, when he makes allegedly defamatory statements in a press conference concerning an ongoing case, Foster, 387 N.E.2d at 449, or when he presents false evidence to a grand jury in seeking an indictment. Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896) . In Foster, the Indiana Supreme Court bald that prosecutorial immunity is necessarily broad to "insure that the prosecutor will be able to exercise the independent judgment necessary to effectuate his duties to investigate and prosecute criminals." Foster, 387 N.E.2d at 449. Thus, where a prosecuting attorney's act "can be characterized as a discretionary function" of the office, he enjoys absolute

immunity from tort liability under Indiana law. I.C. 534—3—16.5-3(6).

The Plaintiff argues that because the acts alleged against the Defendant Lenn are violations of federal and state law, he could not have been performing an "act" within his discretion. (Plaintiff's Supplementary Brief in Response to Defendant Christian Lenn's Motion to Dismiss p.3). In doing so, however, the Plaintiff mistakenly looks to the substance of the acts, and not the nature of the acts in determining whether the acts were discretionary functions.

The "acts" complained of are twofold. First, the Plaintiff alleges that the Defendant Lenn erroneously advised police officers regarding the use of the tape recording. Second, the Plaintiff alleges that the Defendant Lenn initiated and continued criminal prosecutions against the Plaintiff.

Turning to the latter acts alleged to have been committed by Lenn, it is within the plain language of the Indiana Tort Claims Act and longstanding Indiana Court decisions that a prosecuting attorney may not be held liable for malicious prosecution for initiating or continuing a criminal proceeding. I.C. Sec. 34-4-16.5- 3(5); Livingston v. Consolidated City of Indianapolis 398 N.E.2d 1302 (Ind. App. 1979) ; Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896) .

This Court can find no cases heard by Indiana courts egarding a prosecutor giving legal advice to police officers. However, the Court finds that the act of advising officers as to the legality of their actions when investigating a matter -- like the acts of informing the public and accompanying police

officers executing search warrants -- can only be found to be a discretionary function of the office that may be necessary for the prosecuting attorney to investigate and prosecute criminals. As a result, the Defendant Lenn is entitled to absolute immunity from tort liability under Indiana law for his actions when he advised police officers regarding the use of the tape recording.

After considering the foregoing, the Court hereby GRANTS IN PART the Defendant Christian Lenn's Motion for Summary Judgment and DENIES IN PART the Plaintiff's Motion for Partial Summary Judgment as they respectively apply to these claims.

III. Plaintiff's State Wiretap Act Claim

All Defendants argue that they may not be held liable under the Indiana Wiretap Act, I.C. §§35-33.5-5-.1 et seq., because the Plaintiff failed to bring his claim for the alleged violations of the Act within the applicable statute of limitations.

The statute of limitations for bringing a civil action for damages for a violation of the Indiana Wiretap Act is set forth at I.C. Sec. 35-33.5-5-4(d), which provides:

> An action under this section must be brought within two (2) years after the date that the interception, disclosure, or use of a communication in violation of this article initially occurs, whichever is later.

I.C. §35-33.5-5-4(d).

The Indiana Wiretap Act became effective July 1, 1990. Therefore, any acts by Whitlow or Zirkelbach prior to July 1, 1990 are not actionable and did not start the running of the statute of limitations, as the disclosure or use would not have been "in violation of" the Act.

Plaintiff concedes that the initial "use" of the interception "in violation of" the Act was on July 1, 1990, as the interception was being employed as part of the drug prosecution against the Plaintiff on that date.

However, the statute of limitations begins to run when the latest initial installation, use, or disclosure in violation of the Act occurs. As a result, the Plaintiff argues that the initial disclosure of the interception in violation of the Act was when the Defendant Zirkelbach testified at the probable cause hearing on intimidation charges against the Plaintiff on September 12, 1990.

With regard to the disclosure of interceptions, the Indiana Wiretap Act speaks only to the disclosure of "the contents of an interception" as a disclosure in violation of the Act. I.C. §§35-33.5-5-l, 35-33.5-5-2, 35-33.5-5-3(emphasis added). In the probable cause hearing of September 12, 1990, the only mention of the interception by Zirkelbach was as follows:

Q: Okay did [May] turn over any evidence to the Police Department to support . .... . to support that suspicion?

A: Yes, he did, he turned over a tape of a telephone conversation that was between Mr. Davis and a female subject.

Transcript p. 12.

This simply cannot rise to the level of constituting a "disclosure of the contents" of the communication in violation of the Indiana Wiretap Act, and there is no evidence of any other disclosure of the contents of the interception in violation of the Act after July 1, 1990. Therefore, the "interception, use or disclosure" in violation of the Act initially occurring the latest would be the continued use of the interception, which occurred -- according to the Plaintiff -- on July 1, 1990. Because the Plaintiff did not file his original complaint in this action until September 9, 1992, his claims under the Indiana Wiretap Act are time-barred.

As a result of this finding, the Court hereby GRANTS IN PART the Defendants, John Zirkelbach; Richard Whitlow; Art Gann, as Chief of Police for the City of Evansville, Indiana; and the City of Evansville's, Cross Motion for Summary Judgment and DENIES IN PART the Plaintiff's Motion for Partial Summary Judgment as they respectively apply to these claims.

After considering the foregoing, as well as the relevant case and statutory law, the Court hereby DENIES the Plaintiff's Motion to Strike Portions of Affidavits, DENIES AS MOOT the Defendant Christian Lenn's Motion to Dismiss, GRANTS IN PART and DENIES IN PART the Defendants, John Zirkelbach; Richard Whitlow; Art Gann, as Chief of Police for the City of Evansville, Indiana; and the City of Evansville's, Cross Motion for Summary Judgment, GRANTS the Defendant Christian Lenn's Motion for Summary Judgment and DENIES the Plaintiff's Motion for Partial Summary Judgment.

IT IS SO ORDERED this 12th day of September, 1995, at Evansville, Indiana.

GENE E. BROOKS, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

cc: All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION
Cause No. EV 92-158-C R/H

MICHAEL L. DAVIS,

Plaintiff,

v.

JOHN ZIRKELBACH, RICHARD WHITLOW, MICHAEL D. MAY and CHRISTIAN LENN,

Defendants.

FINAL JUDGMENT ENTRY

This matter is before the Court on Motions for Final Judgment Entry filed April 8, 1996, by defendant Christian Lenn, and on April 18, 1996, by defendants John Zirkelbach, Richard Whitlow, Art Gann and the City of Evansville. The parties filed a Stipulation Regarding Filing of Second Amended Complaint on December 23, 1996.

The Court, being duly advised, now enters FINAL JUDGMENT in this case as follows:

1.Plaintiff shall take nothing against defendant State of Indiana and all the plaintiff's claims against the State of Indiana are DISMISSED for the reasons specified in this Court's order granting this defendant's Motion for Judgment on the Pleadings entered May 21, 1993 (Docket No. 62).

2.Plaintiff shall take nothing against defendants Jonathan Parkhust, Robert Pigman, Stanley Levco and Vanderburgh County, Indiana, and all the plaintiff's claims against these defendants are DISMISSED for the reasons specified in this Court's orders panting these defendants' Motions to Dismiss entered December 21, 1992 (Docket No. 49) and February 18, 1993 (Docket No. 58).

3. Plaintiff shall take nothing against defendant Christian Lenn and all the plaintiff's claims against Christina Lenn are DISMISSED for the reasons specified in this Court's order granting the defendant's Motion to Dismiss entered December 231, 19923 (Docket No. 49), the order on the defendant's Motion to Dismiss entered February 18, 1993 (Docket No. 58), and the entry on Motion for Summary Judgment entered September 12, 1`995 (Docket No. 152).

4. Plaintiff shall take nothing against defendants john Zirkelbach, Richard Whitlow, Art Gann and the City of Evansville and all the plaintiff's claims against these defendants are DISMISSED for the reasons specified in this Court's order on the Motion to Dismiss entered December 21, 1992 (Docket No. 49),. the entry on the defendant' Motion for Summary Judgment entered December 16, 1994 (Docket No. 105), and the entry on Motion for Summary Judgment entered September 12, 1995 (Docket No. 152).

Each of these parties shall bear their own costs.

SO ORDERED this 24th day of December,. 1996

cc: Counsel of Record

18 USC Sec. *2510* 01/06/97

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 119 - WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

Sec. 2510. Definitions

As used in this chapter -
(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication;
(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;
(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;
(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

(8) "contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

18 USC Sec. *2511* 01/06/97

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 119 - WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

Sec. 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who -
(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
(b) intentionally uses, endeavors to use, or procures any other
person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when -
(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or (ii) such device transmits communications by radio, or interferes with the transmission of such communication; or (iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or
(iv) such use or endeavor to use (A) takes place on the

premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial

establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or havingreason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e)(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b)-(c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 USC Sec. *2515* 01/06/97

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 119 - WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

Sec. 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 USC Sec. *2517* 01/06/97

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 119 - WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

Sec. 2517. Authorization for disclosure and use of intercepted wire, oral, or electronic communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.
(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

18 USC Sec. *2520* 01/06/97

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 119 - WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

Sec. 2520. Recovery of civil damages authorized

(a) In General. - Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief. - In an action under this section, appropriate relief includes -

(1) such preliminary and other equitable or declaratory reliefas may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of Damages. - (1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has

been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of -

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) Defense. - A good faith reliance on -

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation. - A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

No. 98-722

Supreme Court, U.S.
FILED
DEC 17 1998
THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL L. DAVIS,

Petitioner,

vs.

JOHN ZIRKELBACH; RICHARD WHITLOW; MARVIN GUEST, SR., as Chief of Police for the City of Evansville, Indiana; THE CITY OF EVANSVILLE, INDIANA, CHRISTIAN M. LENN; JONATHAN J. PARKHURST; and STANLEY M. LEVCO, as Prosecuting Attorney for Vanderburgh County, Indiana,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JOHN ZIRKELBACH, RICHARD WHITLOW, MARVIN GUEST, SR., AS CHIEF OF POLICE FOR THE CITY OF EVANSVILLE, INDIANA AND CITY OF EVANSVILLE, INDIANA

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QUESTIONS PRESENTED

I. Did the Circuit Court correctly hold that Petitioner's claims against the police officers and City are barred by the statute of limitations under the Federal Wiretap Act, 18 U.S.C. § 2520(e)?

II. Did the Circuit Court correctly hold that the police officers were protected by the "extraordinary circumstances" exception to the lack of qualified immunity?

III. Did the Circuit Court correctly hold that Petitioner failed to establish "deliberate indifference" exception to the general rule against respondeat superior liability for municipalities in 42 U.S.C. § 1983 actions?

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Other Authority:

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STATEMENT OF THE CASE

Prior to May 1990, neither Police Officer Richard Whitlow (hereinafter "Officer Whitlow") nor Police Officer John Zirkelbach (hereinafter "Officer Zirkelbach") had any knowledge, relationship, or acquaintance with Michael May (hereinafter "May"); Petitioner, Michael Davis (hereinafter "Davis"); or Jeannette Duncan (hereinafter "Duncan").

In the first week of May 1990, Evansville Patrol Officer Steve Green advised Officer Whitlow (a narcotics officer with the Evansville Police Department) that he had been approached by a man named May, who believed one of his employees was involved with narcotics, and that May wanted to speak to a narcotics officer.

Officer Whitlow met with May and was told by May that he owned a business called "Mike's Used Cars." May told Officer Whitlow that he had been told by several people that one of his employees, Davis, was a drug dealer. Some of the things that he had observed involving Davis led him to suspect that this information was true. May told Officer Whitlow that he wiretapped his business telephone to make sure there wasn't illegal activity going on from his place of business. Other than what May told him, Officer Whitlow had no other information concerning the alleged wiretap, the audiotape recording of the alleged wiretap, or the business relationship between May and Davis. May did not give Officer Whitlow any specific information about tapping his phone or making the audiotape. May played the audiotape of the alleged wiretap phone conversation between persons he identified as Davis and Duncan for Officer Whitlow. May had taped the alleged telephone conversation prior to contacting the Evansville Police Department. After listening to the audiotape played by May, Officer Whitlow asked May if he could have the audiotape,

and May told Officer Whitlow he wanted to keep it "to protect himself". Officer Whitlow then advised May that he would need to check with his superiors about how to handle this situation.

Officer Whitlow had been previously involved with taped telephone conversations where one of the two parties had knowledge of the interception of the conversation, but had never been involved in a situation where the parties on the telephone had no knowledge of the taping. Officer Whitlow realized from the beginning that this was a new situation that he had not dealt with before, and wanted to get legal advice before proceeding further. He was not certain whether the Police Department could lawfully use the audiotape in any criminal investigation.

Officer Whitlow initially spoke with his fellow narcotics officer, Officer Zirkelbach, about the situation. Officer Whitlow then went to his immediate supervisor of the Narcotics Division, Lt. Patti Dee Wazny ("Lt. Wazny"). Lt. Wazny advised Officer Whitlow that she was not sure that the audiotape or any of the information could be utilized by the Evansville Police Department. Lt. Wazny was the ranking officer in the Narcotics Division of the Evansville Police Department from June 1988 to February 1993. It was the policy and practice of the Narcotics Division of the Evansville Police Department to follow federal guidelines pertaining to the use of wiretaps. At no time did the Evansville Police Department have any equipment for wiretapping or wire interceptions. The only times that the Evansville Police Department utilized wiretaps were in joint investigations with either the Indiana State Police or the Federal Drug Enforcement Administration. Lt. Wazny advised Officer Whitlow that he should seek the legal opinion of the Prosecutors assigned to the Drug Law Enforcement Program ("DLEP") for legal advice on the use of the audiotape and information received from May. The DLEP was a special program in which designated Deputy Prosecutors were assigned to work with the

Narcotics Division of the Evansville Police Department in the investigation and prosecution of drug cases.

Officer Whitlow telephoned Deputy Prosecutor Christian Lenn ("Deputy Prosecutor Lenn"), who was in the DLEP at his office, and advised him of the circumstances of the audiotape and what was on the audiotape, and sought his legal advice concerning possible use of the audiotape. Deputy Prosecutor Lenn told Officer Whitlow and Lt. Wazny that since the Police Department had not initiated or been involved with the telephone tap and had no prior knowledge of it, and that May had done this on his own and had brought the information to the Police Department, and that the Police Department was just using information from another individual, he felt it could lawfully be used by the police officers. Deputy Prosecutor Lenn then advised Lt. Wazny and Officer Whitlow that the applicable law was such that a business owner could intercept or record conversation on his or her own business telephone. Deputy Prosecutor Lenn told Officer Whitlow and Lt. Wazny that he felt that the audiotape could be used to "flip" the female suspect, Duncan, to become a police informant. But for the advice of Deputy Prosecutor Lenn, Officers Zirkelbach and Whitlow would not have undertaken any action to use the contents of the audiotape against Davis. Officer Whitlow was uncertain as to the legalities involved in the utilization of the audiotape, and would not have acted but for the assurance from Deputy Prosecutor Lenn that it was lawful to act with respect to the said audiotape.

Officer Zirkelbach was advised by Officer Whitlow that Deputy Prosecutor Lenn had given him legal advice that they could proceed with the investigation of Davis based upon the information received from the audiotape which Officer Whitlow received from May. After receiving the legal opinion from Deputy Prosecutor Lenn, Officer Whitlow returned to the bar

where May worked and asked May if he could have the audiotape so that he could make a copy of it. Officer Whitlow made a copy of the audiotape and took the original back to May. Officer Whitlow gave a copy of the audiotape to Officer Zirkelbach, after returning the original to May. Officer Zirkelbach contacted Duncan and advised her that they possessed an audiotape recording of a telephone conversation between Davis and Duncan in which incriminating statements were made. Duncan thereafter cooperated in effectuating an arrest of Davis.

On May 11, 1990, Davis was arrested for violations of state controlled substance statutes. After Davis was formally arraigned and released on bond, Duncan appeared at Davis's place of business on May 21, 1990, and disclosed her reasons for serving as a confidential informant. Duncan was crying, and disclosed to Davis that she had not acted voluntarily. Duncan then and there disclosed to Davis that an Evansville police officer had appeared at her work place and claimed to have an audiotape recording of a conversation between Duncan and Davis. Duncan disclosed to Davis that the police officer revealed that the audiotape recording was of a conversation in which Duncan and Davis discussed possessing or otherwise dealing five pounds of marijuana. Duncan also revealed that the audiotape recording contained a conversation in which Davis and Duncan discussed having sexual intercourse or a "nooner".

Davis acknowledged in deposition that he only had one (1) conversation, in his life, with Duncan regarding five (5) pounds of marijuana and any type of sexual relationship and this conversation occurred over the telephone while Davis was at his place of employment and Duncan was at her place of employment.

On July 19, 1990, Davis registered complaints about Officer Zirkelbach, Officer Whitlow, and other police officers to the Evansville Police Department. Among the complaints made by Davis to Lt. Wazny on July 19, 1990, was a specific complaint about a telephone wiretap recording between Davis and Duncan which was done by May.

On September 9, 1992, Davis filed his Complaint in the United States District Court against the Respondents and others seeking relief under the Federal Wiretap Act, and under 42 U.S.C. § 1983. Davis's Complaint was filed more than two (2) years after Duncan had disclosed to Davis the existence of the audiotape recording of their only conversation regarding drugs and sex.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT DAVIS'S CLAIMS ARE BARRED BY THE ACCRUAL OF THE STATUTE OF LIMITATIONS UNDER THE FEDERAL WIRETAP ACT.

The Seventh Circuit's opinion correctly held that Davis filed his Federal Wiretap action beyond the two (2) year bar of 18 U.S.C. § 2520(e). (App. 7a-8a). More specifically, the Seventh Circuit found that Davis had to bring his claim under the Federal Wiretap Act within two (2) years of the time when he had "a reasonable opportunity to discover the violation". 18 U.S.C. § 2520(e). (App. 7a). Under Section 2520(e) of the Federal Wiretap Act, Davis was not required to have actual knowledge of a violation, only a "reasonable opportunity to discover."

The Statement of the Case contained in the Petition for Writ of Certiorari misstates certain key facts and omits other facts which are crucial to the Seventh Circuit's opinion. (Pet. 1). Davis specifically had reason to know that his telephone conversation with Duncan had been intercepted and audiotape recorded. Duncan appeared at Davis's place of business on May 21, 1990 and disclosed to Davis why she had acted as a confidential informant leading to his arrest on drug charges. Duncan disclosed to Davis that Officer Zirkelbach had appeared at her work place and claimed to have an audiotape recording of the conversation between Duncan and Davis. Duncan told Davis that Officer Zirkelbach revealed that the audiotape recording was of a conversation in which Duncan and Davis discussed possessing or otherwise dealing five (5) pounds of marijuana, and also referred to a portion of conversation which Davis and Duncan discussed having a "nooner" or sexual intercourse. Davis testified in deposition that he only had one (1) conversation in his life with Duncan regarding five (5) pounds of marijuana and engaging in any type of sexual relationship, and that single conversation occurred over the telephone while Davis was at his place of employment and Duncan was at her place of employment. Because Davis and Duncan were in separate locations, this conversation could only have been tape recorded from the telephone. Davis later complained to Lt. Wazny of the Evansville Police Department on July 19, 1990 about a telephone wiretap of the conversation between himself and Duncan, which was done by May and provided to narcotics officers.

Davis filed his Complaint in the United States District Court against the Respondents and others seeking relief under the Federal Wiretap Act, 18 U.S.C. § 2520 and 42 U.S.C. § 1983 on September 9, 1992. Davis's Complaint was filed more than two (2) years after Duncan had disclosed on May 21, 1990 to Davis the existence of the audiotape recording of their only conversation regarding drugs and sex.

II.

THE CIRCUIT COURT CORRECTLY HELD THAT THE POLICE OFFICERS WERE PROTECTED BY THE "EXTRAORDINARY CIRCUMSTANCES" EXCEPTION TO THE LACK OF QUALIFIED IMMUNITY.

The Seventh Circuit upheld the District Court's finding that, although Officer Zirkelbach's and Officer Whitlow's use of the audiotape was a clear violation of established law, the officers were protected by the "extraordinary circumstances" exception to the lack of immunity that was first identified in *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). (App. 10a).

Davis places unfounded reliance on the erroneous decision of the District of Columbia Circuit in *Berry v. Funk*, to the effect that the qualified immunity doctrine applied to constitutional torts and § 1983 actions has no application to a Federal Wiretap claim. 146 F.3d 1003, 1013 (D.C. Cir. 1998). This Court has never adopted the reasoning in *Berry v. Funk* that a qualified immunity defense is not applicable to a statutory claim. To the contrary, the Court in *Harlow v. Fitzgerald* in analyzing the scope of the defense from its prior decision in *Gomez v. Toledo*, 446 U.S. 635, 640 (1990) observed that

> Although Gomez presented the question in the context of an action under 42 U.S.C. § 1983, the Court's analysis indicates that "immunity" must also be pleaded as a defense and actions under the constitution and laws of the United States.

457 U.S. 800, 815 at n.24. In *Davis v. Scherer*, the Court also observed that:

> For the reasons that we discuss, officials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of

> constitutional rights, do not forfeit their immunity by violating some other statute or regulation. Rather, these officials become liable for damages only to the extent there is a clear violation of the statutory rights that give rise to the cause of action for damages.

408 U.S. 183, 194 at n.12 (1984). This Court has consistently held that qualified immunity applies to claims for violation of statutes, as well as constitutional rights without regard to the existence of statutory defenses.

The only real conflict concerning qualified immunity lies among decisions of the District of Columbia Circuit. The opinion in *Berry v. Funk* conflicts with prior decisions in which qualified immunity from liability for damages was granted under Title III of the Omnibus Crime Control and State Streets Acts of 1968 for illegal wiretaps. *See Halperin v. Kissinger*, 1991 WL 120167 (D.D.C.) and *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975). Contrary to Davis's assertion, the doctrine of qualified immunity is not strictly a common law defense limited to common law claims. As this Court observed in *Anderson v. Creighton*:

> Although it is true that we have observed that our determinations as to the scope of official immunity are made in the light of the "common law tradition" (FN5) (*Malley v. Briggs*, 475 U.S. 335, 342 (1986)), we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common

> law with an objective inquiry in the legal reasonableness of official action.

483 U.S. 635, 644 (1987).

The Seventh Circuit in this case upheld the District Court's finding that the "extraordinary circumstances" exception to the lack of immunity that was first identified in *Harlow*, 457 U.S at 819, applied to the facts of this case. Davis misconstrues the Seventh Circuit's opinion in referring to the "four factors" mentioned in *V-1 Oil Co. v. Wyoming*, 902 F.2d 482 (10 Cir. 1990). "The opinion treats these four factors as the exclusive factors for consideration in applying the exception in cases involving reliance on legal advice." (Pet. 11). However, as this Court in *Harlow* explained:

> if the official pleading the defense claims extraordinary circumstances that can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

457 U.S. at 819. Contrary to the assertion of Davis's counsel, the opinion of the Seventh Circuit neither refers to nor suggests "exclusive factors," but merely mentions "relevant factors," including

> how unequivocal, and specifically tailored to the particular facts giving rise to the controversy, the legal advice was, whether complete information had been provided to the advising attorney(s), the prominence and competence of the attorney(s), and how soon after the advice was received the disputed action was taken.

(App. 11a). The Seventh Circuit found that the relevant factors enumerated supported the District Court's decision to grant qualified immunity to Officers Zirkelbach and Whitlow under the facts of this case. (App. 11a). The factors supporting the District Court's decision to grant qualified immunity to Officers Zirkelbach and Whitlow were applied to the following facts: the officers went to Lenn, the Deputy Prosecutor specifically responsible for giving advice to the narcotics division in the police force; Lenn gave precise advice to them about the way the audiotape recording could be used; the legal advice given to them took into the account the circumstances of how the audiotape recording had been made, who had been responsible for the intercept, and how the police had received it; Lenn imposed limits on the officers' use of the audiotape, permitting them to only use it to convince Duncan to cooperate, but not directly use the audiotape; the officers followed the legal advice strictly; they acted promptly after receiving the legal advice; and they had no reason to believe that Lenn's advice was erroneous. (App. 11a-12a). The factors enumerated and applied to the situation involving Officers Zirkelbach and Whitlow clearly fall within the extraordinary circumstances contemplated in *Harlow*, 457 U.S. at 819.

III.

THE CIRCUIT COURT CORRECTLY HELD THERE WAS NO RESPONDEAT SUPERIOR LIABILITY.

Davis complains that the opinion of the Seventh Circuit "briefly concludes with no significant discussion" regarding his claim for respondeat superior liability under § 1983 against Chief of Police Gann and the City of Evansville. (Pet. 15). The Seventh Circuit noted in its opinion that "we can dispose quickly of Davis's claims against Chief of Police Gann." (App. 9a). The Circuit Court concluded that Davis made no showing that

Chief of Police Gann had any knowledge about the particular incident, and therefore could not show that Chief of Police Gann intentionally violated Davis's constitutional rights. (App. 9a).

With respect to the claims against the City of Evansville, the Circuit Court found that Davis had failed to make any allegation in the record which would suggest that the City of Evansville had a policy or practice of unlawfully using intercepted communication in violation of either the Federal Wiretap Act or the Indiana Wiretap Act. (App. 13a). Under this Court's decisions in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) and *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997), the § 1983 claim of Davis must fail.

Davis makes a desperate attempt to save the respondeat superior claim by alleging that the ranking officer in narcotics, Lt. Wazny, had prior knowledge of the use of the audiotape. (Pet. 15). Davis fails to mention the fact that it was Lt. Wazny who referred Officer Whitlow to Deputy Prosecutor Lenn to determine whether the audiotape could be legally utilized. She had no prior knowledge or experience concerning the legality of the audiotape under the circumstances presented to her. These circumstances do not constitute "deliberate indifference" which would constitute a "policy" or "custom" for purposes of § 1983 liability. *See Canton v. Harris*, 489 U.S. 378, 388-90 (1989).

CONCLUSION

The Seventh Circuit Court of Appeals correctly held that Davis's claim against the police officers and the City of Evansville under the Federal Wiretap Act was barred because he failed to commence the action within two (2) years of the time when he had "a reasonable opportunity to discover the violation". 18 U.S.C. § 2520(e). Davis's § 1983 claim is derivative of his wiretap act claim. The statute of limitations applicable under Indiana law to § 1983 claims is also two (2) years. Relevant factors analysis established that the police officers were entitled to qualified immunity under the "extraordinary circumstances" exception of *Harlow v. Fitzgerald*. The Petitioner wholly failed to demonstrate any basis for finding "deliberate indifference" on the part of the Chief of Police or the City of Evansville, which would establish a "policy" or "custom" for purposes of § 1983 liability.

This case does not merit further review, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 98-722

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL L. DAVIS,

Petitioner,

vs.

JOHN ZIRKELBACH; RICHARD WHITLOW; MARVIN GUEST, SR., as Chief of Police for the City of Evansville, Indiana; THE CITY OF EVANSVILLE, INDIANA, CHRISTIAN M. LENN; JONATHAN J. PARKHURST; and STANLEY M. LEVCO, as Prosecuting Attorney for Vanderburgh County, Indiana,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CHRISTIAN M. LENN, JONATHAN J. PARKHURST, AND STANLEY M. LEVCO, AS PROSECUTING ATTORNEY FOR VANDERBURGH COUNTY, INDIANA

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

As to the Respondents, Christian M. Lenn, Jonathan J. Parkhurst, and Stanley M. Levco (hereinafter collectively referred to as "respondent prosecutors"), the only questions presented by the Petition for Writ of Certiorari are as follows:

A. Whether a prosecuting attorney is absolutely immune from civil liability under Federal law where the sole factual basis for liability is the prosecutor's commencement and continuation of a criminal prosecution.

B. Whether petitioner's claim under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 [18 U.S.C. § 2520] ("Federal Wiretap Act") accrued on the date petitioner discovered that his private conversations with another individual had been intercepted without either person's consent and that law enforcement authorities possessed and used an audiotape recording of the intercepted conversation to obtain the other party's cooperation in bringing about the arrest of petitioner.

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COUNTERSTATEMENT OF THE CASE

As to the respondent prosecutors, the facts of this case are fully set forth in the decisions of the District Court (Petitioner's Appendix at 15a - 18a; Petitioner's Appendix at 43a - 68a) and the Seventh Circuit Court of Appeals (Petitioner's Appendix at 1a - 14a), all of which is incorporated herein by reference.

Pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States, respondent prosecutors contend that the Petition for Writ of Certiorari misstates material facts when petitioner's Statement of the Case omits from reference the fact that on or about May 21, 1990, petitioner discovered that his private conversations with a certain Jeannette Duncan (hereinafter "Duncan") had been intercepted without either person's consent and that law enforcement authorities possessed and used an audiotape recording of the intercepted conversation to obtain Duncan's cooperation in bringing about an arrest of petitioner.

Petitioner also materially misstates the facts when he fails to bring to the Court's attention the fact that on July 19, 1990, petitioner appeared at the offices of the Evansville Police Department, and spoke with Lieutenant Patti Dee Wazny, the ranking officer of the Narcotics Section of the Evansville Police Department, for the purpose of registering a complaint about Officers Whitlow's and Zirkelbach's (hereinafter "respondent police officers") use of an audiotape recording of a conversation between petitioner and Duncan. Ms. Wazny stated in an affidavit before the district court, that petitioner complained of a "telephone wire tap" obtained by Officer Whitlow, and that petitioner told her that "Ray Goodall of Tri-State Auto Sales had told him that Michael May had tapped his telephone and obtained a recording of the conversation between Michael Davis and Jeanette Duncan." In the district court below,

petitioner did not dispute or deny his knowledge, in May of 1990, of the existence and use of the audiotape recording of his conversation with Duncan, nor did he deny or dispute appearing at the offices of the Evansville Police Department in July of 1990 to register a complaint about the respondent police officers' use of the audiotape recording in effectuating his arrest. Instead, petitioner maintained in an affidavit presented to the district court below only that he, "was at that time ignorant of the particular means or device or devices used to intercept and record his conversations at his business office".

REASONS FOR DENYING THE WRIT

Insofar as it holds that the respondent prosecutors are absolutely immune from civil liability for commencing and continuing a criminal prosecution, the Seventh Circuit's opinion is in accord the prior precedents of this Court, and does not conflict with the precedents of other Circuits. Likewise, as to the respondent prosecutors, petitioner's federal law claims were filed after the applicable statute of limitations, and thus there is no occasion for this Court to even address the immunity issue.

I.

THE SEVENTH CIRCUIT'S HOLDING ON THE RESPONDENT PROSECUTOR'S ABSOLUTE IMMUNITY IS IN ACCORD WITH THIS COURT'S PRIOR PRECEDENTS, AND DOES NOT CONFLICT WITH OTHER CIRCUITS.

Petitioner's claim that the respondent prosecutors do not enjoy absolute immunity under federal law for their initiation of a criminal prosecution is nothing more than an invitation to revisit this Court's holding in *Imbler v. Pachtman*, 424 U.S. 409 (1976). In *Imbler*, this Court held that a prosecuting attorney

is absolutely immune from civil liability for, "initiating a prosecution and in presenting the State's case". *Imbler*, 424 U.S. at 431. *Imbler* has become the well-settled law of this land, and has been acknowledged and affirmed in almost every case in which this Court has had occasion to address the scope of a prosecutor's absolute immunity. *See, e.g., Burns v. Reed*, 500 U.S. 478 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). Petitioner sets forth no good reason why this Court should revisit its firmly established precedent in *Imbler*.

The petitioner, in effect, calls upon this Court to carve out an exception to *Imbler* where a prosecutor's conduct in initiating a criminal prosecution amounts to a crime or misconduct. In arguing for such an exception, the petitioner forgets that immunity analysis requires that this Court focus on the nature of the prosecutor's acts, not the propriety or impropriety of the acts. *Burns*, 500 U.S. at 486 (this Court's decisions "are consistent with the functional approach to immunity employed in *Imbler*"). Also, not only has this Court never recognized an exception for "criminal acts" or "misconduct", it specifically reasoned in *Imbler* that the proper forum for redressing a prosecutor's criminal behavior or official misconduct is the criminal justice system or professional discipline:

> This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. . . . Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.

Imbler, 424 U.S. at 429. Thus, there is no good reason for this Court to revisit its firmly established precedent in *Imbler*.

The Seventh Circuit's holding with respect to the respondent prosecutor's absolute immunity for the initiation of a criminal prosecution does not conflict with the District of Columbia Circuit's decision in *Berry v. Funk*, 146 F.3d 1003 (D.C. Cir. 1998). In *Berry*, the District of Columbia Circuit held that the qualified immunity doctrine does not extend to actions brought under the Federal Wiretap Act. Its decision was premised upon the fact that the Federal Wiretap Act contains its own, more limited "good faith defense", and that it is inappropriate for the judiciary to graft onto the Federal Wiretap Act its own version of the "qualified good faith immunity doctrine":

> That is so because Title III itself provides a complete defense for "a good faith reliance on . . . a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization." 18 U.S.C. § 2520(d) (1994). . . . This is particularly so when Congress provides for a good faith defense that is more limited than the qualified good faith doctrine the judiciary has devised; Congress, it might be said, has "occupied the field."

Berry, 146 F.3d at 1014.

However, *Berry* does not hold that the doctrine of absolute immunity, as opposed to qualified immunity, is inapplicable to Title III claims. In fact, in addressing the issue of immunity in Title III cases on a previous occasion, the District of Columbia Circuit acknowledged:

> *Officials making adjudicative and prosecutorial decisions are absolutely immune from civil suit based on such actions.* This doctrine assumes that the initiation of a prosecution and the resolution of

> a dispute are especially likely to incite individualized wrath, and that the review processes of the judicial system provide an automatic safeguard against improper actions. Absolute immunity is not available, however, for those same officials for acts not involving adjudication or prosecution. [Emphasis added].

Halperin v. Kissenger, 606 F.2d 1192, 1208 (D.C. Cir. 1979); *See also Forsyth v. Kleindienst*, 599 F.2d 1203, 1217 (3rd Cir. 1979) (Claim brought, in part, under Title III, remanded on question of whether wiretap authorization was "necessary to [a] . . . decision to initiate a criminal prosecution" and thus within the scope of absolute immunity recognized in *Imbler*). Likewise, this Court, in holding the Attorney General had no absolute immunity under Title III when performing national security functions, reasoned that:

> [*b*]*ecause* [*the Attorney General*] *was not acting in a prosecutorial capacity in this case*, the situations in which we have applied a functional approach to absolute immunity questions provide scant support for blanket immunization of his performance of the "national security function". [Emphasis added].

Mitchell v. Forsyth, 472 U.S. 511, 521 (1985). Thus, *Berry* cannot be read as broadly as petitioner suggests.

In this case, petitioner sought to impose civil liability on the respondent prosecutors under the Federal Wiretap Act solely by reason of the fact that they commenced and continued a criminal prosecution. Thus, the Seventh Circuit's holding on these respondent prosecutor's absolute immunity under the Federal Wiretap Act is wholly in accord with this Court's holding in *Imbler*, and does not conflict with *Berry*. Accordingly, there is no basis for review on certiorari.

II.

PETITIONER'S FEDERAL CLAIMS ARE TIME-BARRED.

Certiorari review of this case is likewise unwarranted by reason of the fact that petitioner's federal law claims are time-barred.[1] While petitioner finds fault with the Seventh Circuit's application of 18 U.S.C. § 2520(e)'s "discovery rule" to the facts of this case, such alleged misapplication of the law to the undisputed facts below does not warrant review on certiorari by this Court. *See* Rule 10 of the Rules of the Supreme Court of the United States ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Moreover, the Seventh Circuit correctly determined that petitioner commenced his action more than two years after the applicable statute of limitations. In the district court below, petitioner did not dispute or deny that in May of 1990, he discovered the existence, contents and use of the audiotape recording of his conversation with Duncan. In fact, petitioner never denied or disputed that he acted upon this knowledge when he appeared at the offices of the Evansville Police Department in July of 1990 to register a complaint about the respondent police officer's use of the audiotape recording in effectuating an arrest of the petitioner.

A claim under the Federal Wiretap Act accrues on the date a plaintiff discovers, or had a reasonable opportunity to discover, that his communications had been intercepted:

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1. As the Court of Appeals noted, while it is unclear whether a claim under 42 U.S.C. § 1983 is before the Court, it is of no importance since the statute of limitations under 42 U.S.C. § 1983 and the Federal Wiretap Act are the same — two years. *Davis v. Zirkelbach*, 149 F.3d 614, 618 (7th Cir. 1998).

> **(e) Limitation.** A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

18 U.S.C. § 2520(e). Accordingly, any claim petitioner may have had under the Federal Wiretap Act accrued as early as May of 1990 — more than two years before petitioner commenced his action in the district court.[2] Therefore, the Seventh Circuit correctly held that petitioner's claim under Federal Wiretap Act was time-barred.

Petitioner's alleged ignorance of the particular means or device used to intercept his conversation was not a "material" issue of fact which precluded the district court's entry of summary judgment. As he did below, petitioner maintains that his claim did not accrue in May of 1990 when he learned of the existence and use of the audiotape recording because he allegedly, "was at that time ignorant of the particular means or device or devices used to intercept and record his conversations at his business office". However, petitioner's claim under the Federal Wiretap Act accrued upon learning of the existence and use of the intercepted communication, regardless of whether he had sufficient information to determine whether it was his oral or telephonic conversations that had been intercepted.

Under the plain language of the Federal Wiretap Act, a claim accrues once one, "has a reasonable opportunity to discover the violation." 18 U.S.C. § 2520(e). As correctly noted by the Seventh Circuit, a claim accrues under a "discovery rule", as set forth in 18 U.S.C. § 2520(e), not necessarily when one actually discovers the violation, but rather when one learns of facts sufficient to be placed on notice that a cause of action

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2. Petitioner commenced this action on September 9, 1992.

may exist. This is true even if the claimant has to conduct additional factual investigation to discover that his injury is actionable. *See, e.g., Brock v. TIC International Corp.*, 785 F.2d 168, 172 (7th Cir. 1986) (a claim will accrue under a discovery rule even though one, "might have to do some more investigating before he could be certain that he had a cause of action."); *see also Andes v. Knox*, 905 F.2d 188, 189 (8th Cir. 1990) (a claim accrues under 18 U.S.C. § 2520 when the plaintiff has a reasonable opportunity to discover the violation, "not when she discovers the true identity of the violator or all of the violators"). The Seventh Circuit's application the "discovery rule" set forth in 18 U.S.C. § 2520(e) to the undisputed facts is wholly in accord with this Court's treatment of "discovery rules" in other contexts. *See, e.g., United States v. Kubrick*, 444 U.S. 111 (1979) (a claim accrues when a victim knows of his injury, even though the victim does not know that the injury is actionable).

Thus, even assuming the existence of facts within the record which would be sufficient to support an inference that petitioner harbored a reasonable doubt as to whether the audiotape recording contained lawfully intercepted oral communications, his alleged ignorance of the means or device used to intercept his conversation was not material. The undisputed material facts before the district court established that in May of 1990 petitioner discovered the existence, contents and use of the subject audiotape recording. Such knowledge was sufficient to place petitioner on notice that a violation of 18 U.S.C. § 2510, *et seq.*, may have occurred, and to trigger the statute of limitations.

Finally, petitioner suggests that the Seventh Circuit's holding is not consistent with the Eighth Circuit's holding in *Andes v. Knox*, 905 F.2d 188 (8th Cir. 1990). To the contrary, *Andes* actually supports the Seventh Circuit's holding. In *Andes*,

the claimant filed suit more than two years after discovering that her communications had been intercepted, but claimed that her action did not accrue until she discovered the identity of the perpetrators. Like this case, the Eighth Circuit held that the claimant had a reasonable opportunity to discover the violation upon learning that her conversations had been intercepted, even though additional factual investigation was necessary to discover the identity of the perpetrators.

Therefore, because the Seventh Circuit correctly concluded that petitioner's claim is time-barred, there is no basis for certiorari review of this claim.[3]

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3. In addition, were the Court to grant the petition, the judgment of the district court could be affirmed on other grounds. Namely, as was briefed fully in the Seventh Circuit, the undisputed material facts demonstrated that the respondent prosecutors committed no act that violated the substantive provisions of the Federal Wiretap Act. The respondent prosecutors played no part in utilizing the audiotape recording, in court or otherwise. The most that can be inferred from petitioner's allegations was that respondent Lenn procured others to use the audiotape recording by giving allegedly incorrect legal advise. This does not violate the Federal Wiretap Act. The Seventh Circuit elected not to address the issue, because other issues were dispositive of petitioner's claim. *Davis*, 149 F.3d at 618.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari filed by Michael L. Davis should be denied.

Respectfully submitted,

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